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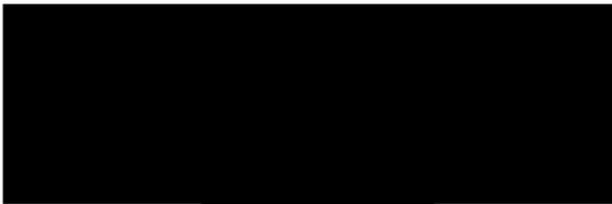
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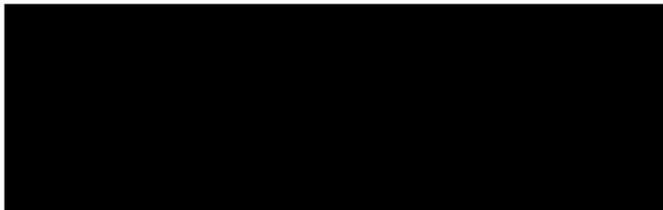


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 26 2006**  
WAC 04 052 53334

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, 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 software development and consultancy firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 denied the petition accordingly. The director also stated that the petitioner had not added to its payroll aliens for whom its alien petitions have been approved, and that it has an additional alien petition pending.

On appeal counsel submitted a brief and additional 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 granting 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.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$89,500 per year.

On the petition, the petitioner stated that it was established during 1998 and that it employs 26 workers. The petition states that the petitioner's gross annual income is \$3 million and that its net annual income is \$100,000. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December 2000. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Oakland, California. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Santa Clara, California.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns, and the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the second, third and fourth quarters of 2002, and the first quarter of 2003.

The petitioner's tax returns indicate that it is a corporation, that it incorporated on March 1, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2001 income tax return<sup>1</sup> shows that it declared taxable income before net operating loss deductions and special deductions of \$15,812. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$127,565 and \$31,803 in current liabilities, which yields net current assets of \$95,762.

The petitioner's 2002 income tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$61,688. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$134,908 and \$57,812 in current liabilities, which yields net current assets of \$77,906.

The petitioner's quarterly returns show that it paid total wages of \$150,078 during the second quarter of 2002, \$179,432.60 during the third quarter, and \$238,815.58 during the fourth quarter, and that it paid total wages of \$229,683.83 during the first quarter of 2003. Of that amount the petitioner paid the beneficiary \$10,216, \$13,824, \$14,500, and \$14,102.65 during those four quarters, respectively.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 12, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center requested copies of the petitioner's California Form DE-6 wage reports for the previous eight quarters and copies of the Form W-2 Wage and Tax Statements issued to the beneficiary since 2001. The service center also specifically requested that the petitioner provide a complete list of all of the aliens for whom it had approved or pending alien worker petitions.

In response, counsel submitted (1) a copy of the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, (2) copies of 2001, 2002, and 2003 Form W-2 forms the petitioner issued to the beneficiary, (3) the petitioner's California Form DE-6 wage reports for the last quarter of 2002, all four quarters of 2003, and the first three quarters of 2004, (4) a list of eleven aliens for whom the petitioner filed petitions, and (5) counsel's own letter dated December 31, 2004.

In his letter counsel stated that the petitioner has been paying wages since 1998 without difficulty, that the petitioner has made significant business gains, that its future prospects are very good, that its salaries are paid

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<sup>1</sup> That return refers to the petitioner both a  
alternative names of the petitioner.

and as [REDACTED] This office finds that both are

from its revenues, and that its future financial results will be sufficient to support the petitioner. Counsel cited no evidence in support of those assertions.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The petitioner's 2003 tax return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$9,906. The corresponding Schedule L shows that at the end of that year the petitioner declared current assets of \$281,599 and current liabilities of \$161,409, which yields net current assets of \$120,919. That return also states that the petitioner paid Line 13 Salaries and Wages of \$1,197,744.

Counsel asserted that the petitioner paid total wages of \$903,621 during 2001, \$688,287 during 2002, and \$1,197,744 during 2003. Those numbers match the numbers shown on Line 13 Salaries and Wages on the petitioner's 2001, 2002, and 2003 tax returns.

Counsel further states that the wage that the petitioner has paid to the beneficiary is in accordance with the non-immigrant visa category in which he has been working, and that the petitioner will pay the beneficiary the amount required by the instant visa category when the Form I-485 petition is approved.

Counsel cited the petitioner's total wage expense as an index of its ability to pay additional wages. Counsel further stated that the petitioner's current assets are an index of its ability to pay the proffered wage, citing non-precedent cases. The figures provided by counsel, however, are the petitioner's total assets.<sup>2</sup>

The W-2 forms show that the petitioner paid the beneficiary \$42,120, \$42,040, and \$60,144.85 during 2001, 2002, and 2003, respectively.

The petitioner's DE-6 wage reports show that the petitioner paid the beneficiary \$14,500 during the last quarter of 2002, \$14,102.65, \$15,259.80, \$15,509.80, and \$15,272.60 during the four quarters of 2003, respectively, and \$14,904, \$11,381.50, and \$8,988.85 during the first three quarters of 2004, respectively. The 2003 wage reports thus confirm the information from the 2003 W-2 form, that the petitioner paid the beneficiary wages of \$60,144.85 during that year. During those quarters the petitioner employed between 19 and 24 workers.

Those DE-6 reports also show the total wages paid by the petitioner during each of those quarters. Those reports show that the petitioner paid total wages of \$238,815.58 during the four quarters of 2003, thus contradicting the figure reported on the 2003 tax return, and counsel's assertion, that the petitioner paid total wages of \$1,197,744 during that year.

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<sup>2</sup> In argument counsel refers to those figures variously as the petitioner's "current assets" and as its "total current assets."

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).

Of the petitioner's eleven alien petitions eight had been approved and three were pending at the time the petitioner submitted its list. The names of two of the alien workers for whom the petitioner has received approved petitions [REDACTED] and [REDACTED], do not appear on any of the quarterly returns previously submitted by counsel.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on March 10, 2005, denied the petition. In that decision the director observed that the petitioner still had an additional alien petition pending.

On appeal, counsel submitted (1) A letter dated April 8, 2005 from the petitioner's owners, (2) a copy of a monthly statement pertinent to a joint account held by the petitioner's owners, (3) letters of resignation from two of the petitioner's employees, (4) a letter from one of the petitioner's owners accepting the resignation of a third employee, (5) three 2001 W-2 forms, and (5) a brief.

The bank statement provided shows that on December 24, 2004 the petitioner's owners had \$144,994 in a joint account.

One of the letters of resignation is dated July 30, 2001 and is from [REDACTED] a beneficiary of an approved alien worker petition whom the petitioner previously employed. That letter asks that the resignation be effective on August 10, 2001. That resignation date is consistent with Mr. [REDACTED]'s name not appearing on any of the quarterly returns or wage reports provided.

This office notes, however, that the Form I-140 petition was **subsequently** approved on January 23, 2002. If the beneficiary no longer intended to work for the petitioner the Form I-140 petition could not correctly be approved, and the petitioner is obliged to withdraw that petition.

The other resignation letter is dated July 1, 2002 and is from [REDACTED] another beneficiary of an alien petition whom the petitioner previously employed. In that letter Mr. [REDACTED] requests to be relieved of his duties as soon as possible. The quarterly returns submitted show that the petitioner employed Mr. [REDACTED] during the second quarter of 2002, which is consistent with a resignation date shortly after July 1, 2002. That quarterly return shows that the petitioner paid Mr. [REDACTED] \$22,740 during that quarter.

Mr. [REDACTED] is not shown as having worked for the petitioner on any of the previous quarterly returns. The wage reports, all of which are for periods after the date of Mr. [REDACTED] letter, indicate that the Mr. [REDACTED] did not work for the petitioner during any of the quarters to which they pertain. The evidence appears to indicate that Mr. [REDACTED] worked for the petitioner during the second quarter of 2002. Although Mr. [REDACTED] letter appears to indicate that he also worked for the petitioner for part of the third quarter of 2002, no other evidence in the record either supports or contradicts that assertion.

The petitioner's owners' April 8, 2004 letter states that the petitioner has an additional \$250,000 as a result of no longer employing the three workers who have resigned from their positions. That letter also states that the petitioner's owners will invest their personal funds as necessary to pay the proffered wage.

The 2001 W-2 forms submitted show that the petitioner paid \$98,030.80, \$79,585.52, and \$75,680 to Mr. [REDACTED] and Mr. [REDACTED] respectively, during that year.

In the brief counsel again stated that the petitioner has been paying the beneficiary in accordance with his current visa category and would begin paying the proffered wage when the Form I-485 petition is approved. Counsel noted that the three beneficiaries who have left its employ have left the petitioner with an additional \$250,000 with which to pay wages.

Counsel reiterated his assertion that the petitioner paid total wages of \$903,621, \$688,287, and \$1,197,744 during 2001, 2002, and 2003, respectively, as well as his argument that a petitioner's total annual wage expense is an index of its ability to pay additional wages. Counsel did not, however, explain the apparent inconsistency of the total wage expense he postulates and the total wage expense shown on the Form DE-6 reports.

Counsel again cites non-precedent decisions of this office for the proposition that a petitioner's "total current assets" are an index of its ability to pay the proffered wage. The figures provided by counsel are, again, the petitioner's total assets. The difference between total assets, current assets, and net current assets is explained below.

Initially, this office notes that the director stated, "The petitioner has employed the beneficiary with earnings significantly less than the proffered wage" the director was stating only that such payments, therefore, do not show the petitioner's ability to pay the proffered wage. This was not one of the bases for denial.

The thrust of the director's statement, as this office understands it, does not offer payment of an amount less than the proffered wage, *per se*, as a reason for denial.<sup>3</sup> Rather, the director appears to refer to CIS policy that a petitioner can show its ability to pay the proffered wage, or some portion of it, during a given year by showing that it did actually pay the proffered wage, or some portion of it, to the beneficiary for performance of the duties of the proffered position. The director was only noting that, in paying only a portion of the proffered wage to the beneficiary during salient years, the petitioner had not, by that particular means, shown the ability to pay the entire proffered wage. The petitioner is free to demonstrate the ability to pay the difference during the salient years, notwithstanding that it actually paid the beneficiary less during those years.

Counsel's reliance on non-precedent decisions is misplaced. 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

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<sup>3</sup> In any event, the instant visa category does not require the petitioner to pay the proffered wage, or any portion of it, prior to approval of the Form I-485 visa petition.

not similarly binding. Although this office will consider any argument brought before it, including those based on the reasoning of non-precedent decisions, counsel's citation of a non-precedent decision is, in itself, of no effect.<sup>4</sup>

The statement of the petitioner's owners that they will use their own funds as necessary to meet the petitioner's debts and obligations is also of no effect. 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). Because a corporation is a separate and distinct legal entity from its owners and shareholders they are not obliged to pay the debts of the corporation, and the income and assets of its owners or of other enterprises or corporations cannot, therefore, be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The assets of the owners include the joint bank account balance mentioned above. That balance is not directly relevant to any material issue in this case because it represents an asset of the petitioner's owners, rather than of the petitioner.

Even if the account were that of the petitioner, counsel's reliance on the bank statements in this case would be 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.<sup>5</sup> 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.

Counsel argues that the wages paid to three named former employees are now available to pay the wage proffered to the instant beneficiary. Counsel's argument is unconvincing. If the petitioner had paid wages during a given year to an employee that it proposed to replace with the beneficiary as soon as he became available, then those wages could be shown to have been available to pay the proffered wage. That is, at any

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<sup>4</sup> As is explained below, counsel's assertion that a petitioner's can show its ability to pay the proffered wage with its net current assets is correct, notwithstanding that counsel cites non-precedent cases in its support. However, as is also explained below, counsel misidentifies the petitioner's total assets as its net current assets.

<sup>5</sup> 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.

point the petitioner would have replaced the incumbent with the beneficiary and paid the incumbent's wages to the beneficiary.

In the instant case the petitioner does not assert that it would have replaced the former employees, or any one of them, with the beneficiary.<sup>6</sup> Rather, the petitioner appears to argue that because it was previously paying wages to those employees and then stopped, those wages are now at its disposal.

However, wages paid to former employees during 2001, for instance, do not show the ability to pay additional wages during subsequent years. If relieving previous employees of their duties has resulted in surplus funds available to pay additional wages that surplus should be reflected on the petitioner's tax returns or whatever other documentary evidence it uses to demonstrate its ability to pay the proffered wage.

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 \$90,000 in net profits cannot show the ability to pay the wages of an infinite number of workers at \$90,000 each per annum nor, in fact, more than one. Thus CIS must take notice of other pending petitions when evaluating the petitioner's ability to pay the proffered wage.

In the instant case the petitioner was told that,

. . . any petition that has not yet been adjudicated and (is) still pending with USCIS must also be taken into consideration when evaluating the petitioner's ability to pay the beneficiary's wage.

The petitioner was obliged to show that it was able to pay the wage proffered to the beneficiary and that proffered to the beneficiary of any other pending alien petition.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary \$42,120 during 2001, \$42,040 during 2002, and \$60,144.85 during 2003.

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.*

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<sup>6</sup> This assertion would be incongruous with the fact that the petitioner did actually employ the beneficiary during those same years.

*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).

Counsel argues, however, that the amount of the petitioner's wage expense demonstrates its ability to pay the additional amount of the proffered wage. First, the amount of the petitioner's annual wage expense is unclear from the evidence submitted. Further, counsel's reasoning is unconvincing. The regulation at 8 C.F.R. § 204.5(g)(2) makes an exception to the necessity of a petitioner demonstrating, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage, if the petitioner is able to demonstrate that it employs 100 or more workers. No such exception is included in that regulation for companies with an annual payroll expense in excess of any particular amount and none will be construed. That the petitioner was apparently able to pay its expenses during the salient years does not demonstrate the ability to pay any additional wages.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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>7</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.

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<sup>7</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The priority date is July 2, 2001. The wage proffered to the beneficiary is \$89,500 per year. Given that the petitioner filed ten additional Form I-140 petitions, in addition to the instant petition, since 2001 at least one other petition was pending during each year of the pendency of the instant petition. Further, for the sake of analysis this office will presume that the wage offered to the beneficiary of the other pending petition is also \$89,500 per year.<sup>8</sup> Pursuant to this analysis the petitioner must show the ability to pay \$179,000 per year.

The petitioner has demonstrated that it paid the beneficiary \$42,120 during 2001 and must show the ability to pay the \$136,880 balance of the wages proffered to two beneficiaries. During 2001 the petitioner had taxable income before net operating loss deductions and special deductions of \$15,812. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner net current assets of \$95,762. That amount is also insufficient to pay the aggregate wages proffered. The petitioner has provided no reliable evidence of any other funds available during that year to pay additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

The petitioner has demonstrated that it paid the beneficiary \$42,040 during 2002 and must show the ability to pay the \$136,960 balance of the wages proffered. During 2002 the petitioner had taxable income before net operating loss deductions and special deductions of \$61,688. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner net current assets of \$77,906. That amount is also insufficient to pay the aggregate wages proffered. The petitioner has provided no reliable evidence of any other funds available during that year to pay additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it paid the beneficiary \$60,144.85 during 2003 and must show the ability to pay the \$118,855.15 balance of the wages proffered. During 2003 the petitioner had taxable income before net operating loss deductions and special deductions of \$9,906. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$120,919. That amount is sufficient to pay the aggregate wages proffered. Assuming that only the instant petition and one other petition were pending during that year, the petitioner has demonstrated the ability to pay the proffered wage during 2003.

The request for evidence in this matter was issued on October 12, 2004. On that date the petitioner's 2004 tax return was unavailable. The petitioner is excused from providing evidence of its ability to pay the proffered wage during 2004 and subsequent years.

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<sup>8</sup> If the foregoing is prejudicial to the petitioner's interests the error may be addressed on motion. If the petitioner attempts to overcome today's decision on motion, however, it should provide the receipt numbers of each other pending alien petition, evidence pertinent to the exact amount offered to the beneficiary of each other pending alien petition, evidence pertinent to how much each of the other beneficiaries were paid during each of the salient years, and the priority dates and approval or denial dates of each of those other petitions.

Counsel did not reveal the amount of the wages proffered to the other beneficiaries and that information is not immediately available to this office. For the purpose of analysis this office will assume, *arguendo*, that the proffered wages in the other cases are \$89,500, the same as in the instant case. Before the petition could be approved, however, the petitioner would be obliged to provide the actual amounts of the wages proffered to the other beneficiaries. That is, even if the petition were approvable pursuant to the instant analysis, the matter would be subject to remand.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 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 this basis.

The record suggests an additional issue not discussed in the decision of denial. The Form ETA 750 states that the petitioner would employ the beneficiary in Oakland, California, which is in Alameda County. The Form I-140 alien worker petition states that the petitioner would employ the beneficiary in Santa Clara, California, which is in Santa Clara County. Because the issue of the location at which the beneficiary would be employed formed no part of the basis of the decision of denial the petitioner has not been accorded an opportunity to address it, this office will not rely on that basis, even in part, as a basis for today's decision. If the petitioner attempts to overcome today's decision on motion, however, it should address the issue of whether a labor certification for employment in Alameda County is valid for employment in Santa Clara County.

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.