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**U.S. Citizenship
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Services**

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 16 2007
SRC 05 256 52036

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:
[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

Although the petitioner stated on the Form I-140 that it is a "Market Research Analyst," reference to the Internet and the petitioner's tax returns demonstrates that it is a medical equipment supplier. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed, makes a specific allegation of error in law or fact, and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the issues in this case are whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether it has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 9089 labor certification.

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

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.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address,

and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, *See* 8 C.F.R. § 204.5(d), which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted on August 2, 2005. The proffered wage as stated on the Form ETA 9089 is \$55,800 per year. The Form ETA 9089 states that the position requires a bachelor's degree in marketing or public relations and two years of experience in the proffered position. On the petition, the petitioner stated that it was established during 1999 and that it employs three workers. Both the petition and the Form ETA 9089 indicate that the petitioner would employ the beneficiary in Miami, Florida.

On the Form ETA 9089, which the beneficiary signed, the beneficiary did not claim to have worked for the petitioner. The beneficiary stated that he had worked (1) as a Market Research Analyst for Steel's Company, in Lima, Peru, from January 10, 1989 to June 25, 1992, and (2) as a Financial and Marketing Advisor for Financial Experts One in North Miami Beach, Florida from May 22, 2001 to August 2, 2005

The Form I-140 petition in this matter was submitted on September 21, 2005. On the petition, the petitioner stated that it was established during 1999 and that it employs three workers. The petition states that the petitioner's gross annual income is \$714,407 and that its net annual income is \$49,169. Both the petition and the Form ETA 9089 indicate that the petitioner would employ the beneficiary in Miami, Florida.

In the instant case the record contains (1) the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, (2) Form 941 Employer's Quarterly Federal Tax Returns, (3) a letter dated July 19, 2005 from the vice-president of "RPC Medical," (4) a December 14, 2005 letter from a bank, (5) compiled financial statements, (6) copies of monthly statements pertinent to the petitioner's bank account. The record does not contain any other evidence directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains (1) an employment verification letter dated March 29, 2005 in Spanish and an English translation, (2) an employment verification letter dated August 1992 in Spanish and an English translation, (3) a March 10, 1993 court decree divorcing the beneficiary and [REDACTED] (4) a G-325 Biographic Information form the beneficiary submitted on March 18, 1993 in connection with an asylum claim, (5) an affidavit dated December 7, 2005 from the managing director of Steel's & Compania, (6) a 2004

Form W-2 Wage and Tax Statement showing that Financial Experts One Incorporated paid the beneficiary \$22,950 during that year, (7) photocopies of checks drawn by Alta Finance & Investments Incorporated to the beneficiary's order, (8) a copy of a letter dated February 14, 1992 from Steel's & Compania, (9) a B1/B2 visa issued to [REDACTED] the managing director of Steel's & Compania, (10) an affidavit dated November 30, 1998 in Spanish and an English translation, (11) a medical certificate dated December 18, 1998, (12) a medical certificate dated December 24, 1998 in Spanish and an English translation, and (13) an affidavit dated December 14, 2005 from the beneficiary. The record contains various other documents pertinent to the operations of Steel's & Compania. The relevance of those documents to whether the beneficiary worked for Steel's & Compania as claimed is unknown to this office. The record does not contain any other evidence directly relevant to the beneficiary's claim of qualifying employment experience.

The record contains a Form I-140 multinational executive or manager petition filed on June 22, 2001 by Financial Expert Incorporated of Miami, Florida¹ along with various supporting materials. The beneficiary in the instant case is also the beneficiary listed on that petition. The record also contains a July 2, 2003 letter in which the beneficiary withdrew that petition, but without stating a reason.

The petitioner's tax return shows that the petitioner is a corporation, that it incorporated on October 22, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year. During 2004 the petitioner reported taxable income before net operating loss deduction and special deductions of \$49,169. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The Form 941 quarterly returns submitted cover the first, second, and third quarters of 2001 and show that the petitioner employed four, one, and four workers and paid gross wages of \$9,000, \$6,696, and \$19,080 during those quarters, respectively.

The July 19, 2005 letter from RPC Medical states that the petitioner, RPC Medical Corporation, is a wholly-owned subsidiary of RPC Medical Ltd. of Barranquilla, Colombia.

The bank's December 14, 2005 letter states that the petitioner is a client of that bank with a balance over \$36,000.

The March 29, 2005 employment verification letter is from [REDACTED], the managing director of Steel's & Compania S.A.C. in Lima, Peru. It states that the beneficiary worked for that company as a market research analyst from January 10, 1989 to June 25, 1992.

The August 1992 employment letter is from the regional accountant and the chief of operations of El Banco Nacional cooperative del Peru Ltda. and states that the beneficiary worked for that company as assistant

¹ The decision of denial also mentions a Form I-140 petition, which listed the instant beneficiary's spouse as beneficiary and which the beneficiary of the instant petition signed as owner of that company. Details pertinent to that petition are not readily available to this office. This office notes, however, that this convoluted history of visa petitions filed for the instant beneficiary, as well as others filed by the instant beneficiary, raises the issue of the *bona fides* of the job offer.

regional manager of the Northeast Region at that time. That letter does not state the beginning or ending dates of that employment.

The instructions to the G-325 Biographic Information form, which the beneficiary signed on March 18, 1993, requested the beneficiary's employment history during the previous five years. Although that request required the beneficiary to list all employment from March 18, 1988 to March 18, 1993, the beneficiary did not list the employment he now claims, with Steel's & Compania S.A.C. in Lima, Peru from January 10, 1989 to June 25, 1992. Rather, the beneficiary stated on that form that he worked from November 1985 to April 1989 as manager of Banco Central de Credito Cooperativo in Lima, Peru; and from April 1989 to September 1992 and as manager of Banco de las Cooperatives, in Chiclayo, Peru.

Further, on the G-325 Biographic Information form, the beneficiary, who signed that form on March 18, 1993, stated that he was married to [REDACTED] on February 4, 1989 and remained married to her. On the Form I-589 Request for Asylum the beneficiary stated that he was married to [REDACTED]

The March 10, 1993 divorce decree shows that on that date the beneficiary and [REDACTED] were granted a divorce in Miami, Florida. That decree does not indicate the date when the beneficiary and [REDACTED] filed for divorce. This office notes that the divorce decree predates the beneficiary's statement, on March 18, 1993, that he was married to [REDACTED]

The February 14, 1992 letter from [REDACTED], the managing director of Steel's & Compania, states that at that time the beneficiary was authorized to negotiate for the company in opening new offices. That letter is printed on company letterhead and purports to have been written in Peru.

The photocopied checks show that Alta Finance & Investments Incorporated paid the beneficiary \$692.77 on November 11, 2005 and on November 25, 2005.

The December 7, 2005 affidavit from [REDACTED], the managing director of Steel's & Compania, affirms that the beneficiary worked as market research analyst beginning during January 1989. Although that firm is in Peru, and the affidavit was printed on that company's letterhead, the affidavit was notarized in Miami, Florida.

The B1/B2 visa issued to the managing director of Steel's & Compania indicates that the managing director entered the United States on November 23, 2005.

The director general of a medical clinic in Cajamarca, Peru signed the November 30, 1998 Spanish affidavit. The English translation indicates that it states that the beneficiary presented with injuries to various parts of his body and was treated for anxiety from November 3, 1991 to November 18, 1991.

A physician in Chiclayo, Peru signed the December 18, 1998 medical certificate. The English translation indicates that he examined the beneficiary on January 2, 1992, diagnosed peptic ulcer and anxiety, and recommended evaluation by a specialist.

The December 24, 1998 medical certificate and English translation state that another physician in Bagua Grande, Peru examined the beneficiary on January 8, 1992. The physician diagnosed anxious depressive syndrome and gastritis and recommended rest and treatment by a psychiatrist and gastroenterologist.

The beneficiary's December 14, 2005 affidavit states that his claim of employment for Steel's Compania and his claim of employment for Banco Central de Credito Cooperativo in Lima, Peru are both legitimate, but that he did not include the employment for Steel's Compania on his Form G-325 because it was unrelated to his asylum claim, whereas his employment for the bank was central to that claim. The beneficiary stated that he worked approximately 30 hours per week at the bank, and the hours were flexible, allowing him to also work full-time for Steel's & Compania.

The beneficiary further stated that he never saw the Form I-140 petition submitted for him during 2001 by his previous attorney. The beneficiary further stated that he left employment with Financial Experts One, Incorporated during September 2005 and now works for his wife at Alta Finance and Investments, Incorporated for \$1,841 per months. The beneficiary stated that he has a considerable financial incentive to leave that employment and work for the petitioner.

In a notice of intent to deny dated November 17, 2005 the Director, Texas Service Center, noted that the beneficiary's employment history as stated on the March 29, 2005 employment verification letter, submitted with the instant Form I-140 visa petition,² and that stated on the Form G-325, submitted with a 1993 asylum application, conflicted. In that notice the director also requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Further still, the director noted that the petitioner stated on the Form 9089 that he works as a market research analyst for Financial Experts, Incorporated, and has indicated on petitions filed by Financial Experts, Incorporated that he is its president. The director requested evidence that the beneficiary intends to cease working for his own company, Financial Experts, Incorporated, to work for the petitioner.

In response to the notice of intent to deny counsel submitted the December 14, 2005 affidavit from the beneficiary. Counsel asserted that the evidence does not conflict, but demonstrates that the beneficiary held two full-time jobs in Peru.

Counsel urged that although the petitioner's tax return does not, in itself, demonstrate the petitioner's ability to pay the proffered wage during the entire salient period, the unaudited financial statement and the bank statements supplement them sufficiently to show that ability.

The director denied the petition on December 23, 2005, finding that the petitioner had failed to demonstrate that it has had the continuing ability to pay the proffered wage beginning on the priority date and that it had failed to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification.

² The notice of intent to deny erroneously stated that the visa petition in this matter is for a multinational manager or executive.

In that decision the director noted that the beneficiary had failed to list his employment at Steel's Compania on the G-325, although he was required to do so if he had actually worked there. The director also noted that the December 24, 1998 medical certificate the beneficiary submitted in support of his asylum claim stated that on January 8, 1992 the doctor recommended rest and treatment by a psychiatrist and gastroenterologist, and that this seemed inconsistent with the beneficiary working two jobs during that period.

The director noted that in connection with a Form I-140 visa petition he submitted for his wife as beneficiary, the instant beneficiary, when asked to clarify the nature of their relationship, stated that they had recently married, although a marriage license in the record demonstrated that they had married in Peru in 1989.

The director noted that the coincidence of the beneficiary locating the president of his former Peruvian employer in his new hometown of Miami, Florida when he needed additional evidence in support of his employment claim was unusually fortuitous.

Finally, the director noted that, pursuant to *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988), 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, that the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence, and that attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice.

On appeal, counsel asserted that the evidence demonstrates that the beneficiary has the requisite two years of employment experience and that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

As to the beneficiary's employment history, counsel notes that the petitioner's employment for Steel's Compania was disbelieved because it was not claimed on a previous G-325. Counsel urges that the beneficiary did not put it there because it was not critical to his asylum claim and implies that he may not have known he was required to list all of his recent employment on that form.

As to the coincidence of finding [REDACTED] the managing director of Steel's Compania, in Miami, counsel stated that it was not coincidental given that [REDACTED] owns a business and the visa submitted shows that he was admitted to the United States shortly before he signed the questioned affidavit.

Counsel also stated that the record contains no indication that the beneficiary complied with the doctor's recommendation of January 8, 1992 that he rest and receive treatment.

As to the date of the beneficiary's marriage, counsel stated that the director did not take into account that the beneficiary had divorced his wife and remarried her, and that the statement that they had recently married was therefore accurate. Although the record had previously contained no evidence pertinent to the beneficiary's divorce and remarriage, counsel provided a copy of the March 10, 1993 divorce decree. Counsel provided no evidence pertinent to the recent remarriage.

Counsel implied that at least some of the apparent inconsistencies in the record are the result of the beneficiary's original attorney, who was subsequently imprisoned for immigration fraud.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Counsel's implication that the beneficiary's previous attorney was responsible for the content of his previous submissions will not be considered.

Reliance on the quarterly returns provided is misplaced. The total amount the petitioner paid to all of its employees exceeded the quarterly amount of the proffered wage during only one of the three quarters for which returns were provided. Further, the record contains no indication that the petitioner could replace all of its other employees, or any of them, with the beneficiary, a market research analyst. The wages the petitioner paid to its other employees have not been shown to be available to pay the proffered wage.

Counsel's assertion that the beneficiary and his wife divorced on March 10, 1993 and subsequently married each other again may explain the statement the beneficiary made on his petition for his wife that they had recently married.³ It raises the question, however, of why the beneficiary stated, on the G-325 Biographic Information form and the Form I-589 Request for Asylum, which he signed about a week later, that he was married to Tania Ruth Perez Ruiz. The evidence provided does not successfully parry the assertion that the beneficiary has provided false information in previous immigration matters.

Counsel's argument in the instant matter, in which he proposed that the beneficiary worked for both Steel's Compania and Banco Central de Credito Cooperativo, declined to mention his employment on the G-325 because he did not feel it was necessary, did not follow his doctor's advice to rest from either of his jobs while he was being treated for stomach problems and anxiety, and that the general manager of his former employer in Peru happened to be in Miami when the beneficiary needed additional employment documentation is misdirected.

To propose a possible, or even a feasible, reconciliation of the divergent facts noted in the decision of denial is insufficient. As was noted above, pursuant to *Matter of Ho, Id.*, the petitioner is obliged to demonstrate the truth of these matters with independent objective evidence, rather than merely attempting to explain or reconcile the apparent inconsistencies in the evidence presented. The failure to provide that independent evidence prompts this office to reexamine not only the evidence that has those manifest inconsistencies, but all of the other evidence presented.

³ As that record is not before this office we are unable to determine the date upon which the beneficiary stated that he was recently married and to compare that date with the date on the divorce decree. Further, no evidence is in the record that demonstrates the date of the remarriage. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, contrary to counsel's assertion, the evidence does suggest that the beneficiary followed some portion of his doctor's advice, in that the November 30, 1998 affidavit states that he received psychological treatment from November 3, 1991 to November 19, 1991. The director correctly noticed that the beneficiary's condition and its treatment would both likely interfere with the beneficiary's working two jobs.

The March 29, 2005 employment verification letter purports to have been produced in Lima, whereas the signature on the December 7, 2005 affidavit was attested to in Miami. Both, however, were on company letterhead and both received the same stamp and were signed by the same person. This office finds that it is possible, but unlikely, that the general manager of Steel's & Compania had access to the same letterhead and the same rubber stamp on both continents. That [REDACTED], general manager of Steel's & Compania was in Miami, with his company letterhead and personal stamp, and was able to remember the exact dates of the beneficiary's employment, remains suspiciously fortuitous, notwithstanding counsel's assertion that he owns a business.

The assertion that, due to passage of time, no contemporaneous records of the beneficiary's employment for Steel's & Compania is plausible. It does not constitute independent objective evidence sufficient to satisfy the requirements of *Matter of Ho*, however, but merely an assertion that no satisfactory evidence is available. That is insufficient to support the beneficiary's employment claim.

Further, the lack of any records of the beneficiary's employment with Steel's & Compania raises doubts about the professed ability of [REDACTED], the managing director of that company, expressed in his employment verification letter of March 29, 2005, to remember that the beneficiary worked from precisely January 10, 1989 to precisely June 25, 1992.

The petitioner has not demonstrated that the beneficiary has the requisite two years of qualifying employment experience. The petition was correctly denied on this basis, which has not been overcome on appeal.

The proposition that counsel intended to support with evidence that the petitioner is a subsidiary of another company is unclear. It does not affect the inquiry into whether the petitioner has demonstrated its ability to pay the proffered wage.

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, whether corporate, individual, or otherwise, 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.

Counsel's reliance on the unaudited financial statements submitted is misplaced. The regulation at 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. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel's reliance on the bank statements in this case and the December 14, 2005 bank letter is misplaced. First, evidence pertinent to bank balances is 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, the bank statements and the bank letter show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴ Third, no evidence was submitted to demonstrate that the funds in the petitioner's bank account somehow reflect additional available funds that were not reported on its tax return.

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 that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had

⁴ 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.

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, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ 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 petition in this matter was submitted on September 21, 2005. On that date the petitioner's 2005 tax return was unavailable. On November 17, 2005 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 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The priority date is August 2, 2005. Ordinarily, in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date, this office would consider only the year during which the priority date fell and subsequent years.

The only year for which evidence was submitted, however, and the only year this office can examine in determining the petitioner's ability to pay the proffered wage, is 2004.

The proffered wage is \$55,800 per year. During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$49,169. That amount is insufficient to pay the proffered

⁵ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2004 with which it could have paid additional wages. The petitioner has not demonstrated that it would have been able to pay the proffered wage during 2004.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. For both reasons, the petition may not be approved.

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

ORDER: The appeal is dismissed.