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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 03 2010
LIN 07 116 53634

IN RE: Petitioner:
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software sales business. It seeks to employ the beneficiary permanently in the United States as a computer systems analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards. Therefore, the director denied the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 October 4, 2007 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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 either 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 14, 2005.[1] The proffered wage as stated on the Form ETA 750 is $81,040 per year. The Form ETA 750 states that the position requires a U.S. bachelor's degree or the foreign degree equivalent in Computer Science, Computer Technology or a related degree, as well as two years of experience in the proffered position or in the related field of computer consulting or project management.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of $3,246,144 and to currently employ 17 workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on January 10, 2005, the beneficiary claimed to have worked for the petitioner from 2003 until the date that he signed that form.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS 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).

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[1] United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has petitioned for a second beneficiary. That petition has a priority date of September 27, 2005 and it was approved on May 22, 2006. USCIS records indicate that the beneficiary in that matter has not adjusted to lawful permanent residence. The petitioner also petitioned for a third beneficiary and the priority date on that petition is June 4, 2007. USCIS approved that petition on July 28, 2008. That beneficiary's request to adjust to lawful permanent residence is still pending. Thus, during 2005 and 2006, the petitioner had one additional sponsored worker whose petition was pending. During 2007 and following, the petitioner had two additional sponsored workers whose petitions were pending. The AAO issued a Request for Evidence (RFE) dated June 2, 2010 in this matter and in response, the petitioner provided documentation of the proffered wages in these two other cases and documentation of the amounts that it paid these other sponsored workers during the relevant period.

[2] 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). Here, the record provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid 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.

Here, the beneficiary's 2005 Form W-2, Wage and Tax Statement, in the record reflects that the petitioner paid the beneficiary $63,000 in 2005, or $18,040 less than the proffered wage. The 2006 Form W-2 reflects that the petitioner paid the beneficiary $66,150 in 2006, or $14,890 less than the wage. The 2007 Form W-2 reflects that the petitioner paid the beneficiary $72,183.35 in 2007, or $8,856.65 less than the wage. The 2008 Form W-2 reflects that the petitioner paid the beneficiary $82,000 in 2008, which is also more than the proffered wage. The 2009 Form W-2 reflects that the petitioner paid the beneficiary $88,875 in 2009, which is more than the wage.

Thus, the petitioner has established an ability to pay the wage in 2008 and 2009 through actual wages paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service (INS), now USCIS, 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 the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

> accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 13, 2007 with the receipt by the director of the petitioner's initial submission of evidence filed with the petition.[3] Later, in response to the AAO's RFE dated June 2, 2010, the petitioner provided its most current tax returns. As of that date, its 2009 return was not yet available. Because the petitioner has already demonstrated an ability to pay the wage in 2008, this office will not analyze the 2008 Form 1120 in this section. The petitioner's tax returns demonstrate its net income for 2005, 2006 and 2007, as shown in the table below.

- The 2005 Form 1120 states net income (loss) of -$222,908.
- The 2006 Form 1120 states net income of $168,486.
- The 2007 Form 1120 states net income (loss) of -$304,922.

Thus, in 2005, the petitioner did not have sufficient net income to pay the difference between the actual wages paid the beneficiary and the proffered wage, or $18,040. In 2005, the petitioner also had pending the petition of another full-time employee, whose proffered salary was $54,000. This worker's 2005 Form W-2 in the record reflects that the petitioner paid him more than that wage or $74,100 in 2005.

In sum, the petitioner has not demonstrated that it had sufficient net income to pay the instant proffered wage in 2005.

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[3] The petitioner was not required to submit its 2003 and 2004 Forms 1120, as 2005 is the priority date year in this matter. However, the 2003 and 2004 Forms 1120 are in the record. This office will consider the information on these forms when analyzing the totality of the circumstances affecting the petitioner, later in this analysis.

In 2006, the petitioner had a net income which is sufficient to cover the difference between the actual wages paid the beneficiary and the proffered wage, or $14,890. The petitioner had an additional petition pending for a different worker in 2006. This sponsored worker's 2006 Form W-2 in the record reflects that the petitioner paid him $94,200 in that year, which is more than that worker's proffered wage. Thus, the petitioner has shown that it had sufficient net income to pay the instant wage and its additional sponsored worker's wages in 2006.

By 2007, the petitioner had two additional petitions pending. It did not have a net income sufficient to cover the difference between the actual wages paid the beneficiary in 2007 and the instant proffered wage or $8,856.65. One of the petitioner's other sponsored worker's 2007 Form W-2 in the record reflects that the petitioner paid this worker $97,500 in 2007, which is more than that worker's proffered wage. The other sponsored worker's proffered wage is $74,110. That worker's 2007 Form W-2 in the record reflects that the petitioner paid this worker $65,025 in 2007, or $9,085 less than the proffered wage in that matter.

In sum, during 2007, the petitioner did not have sufficient net income to cover the instant wage or the wage of all its sponsored workers.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets, however, will not be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand. Its year-end current liabilities are shown on lines 16(d) through 18(d). If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 and 2007, as shown in the table below.

- The 2005 Form 1120 reflects net current assets (liabilities) of -$350,521.

[4]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The 2007 Form 1120 reflects net current assets (liabilities) of -$1,081,693.

In 2005 and 2007, the petitioner had negative net current assets. Thus, it has not shown an ability to pay the difference of the wage that it paid the beneficiary during those years and the proffered wage using its net current assets. It also has not shown the ability to pay out of its net current assets during 2007, the difference between the wage that it paid an additional sponsored worker in that year and that worker's proffered wage or $9,085.

Thus, the petitioner has not shown an ability to pay the instant wage using its net current assets during the year 2005. It also has not shown the ability to pay the instant wage or all its sponsored workers' wages in 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the January 14, 2005 priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets. It has shown the ability to pay the instant wage in 2006, 2008 and 2009 only.

Counsel has suggested that language in the May 4, 2004 USCIS Interoffice Memorandum written by [redacted] supports the finding that the beneficiary's 2008 and 2009 Forms W-2 in the record, which indicate that the petitioner is currently paying the beneficiary slightly more than the proffered wage, are sufficient to demonstrate that the petitioner has had the continuing ability to pay the proffered wage from the priority date onwards. *See* Interoffice Memo. from [redacted] Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). First, USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Also, as noted previously, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Counsel may not interpret the May 4, 2004 Yates memorandum as granting the petitioner the right to sidestep this regulatory requirement by showing that the petitioner is currently paying the beneficiary the proffered wage or that wages paid in 2008 and 2009 would show an ability to pay the wage from 2005 onwards. The AAO must examine whether the petitioner has shown an ability to pay the proffered wage from the priority date onwards, and dismiss the appeal if it has not.

Counsel also indicated that because the petitioner was able to provide significant salary raises to the beneficiary during 2006 and 2007 and because the petitioner has recently begun to pay the beneficiary an annual salary which is slightly more than the proffered wage, the AAO should find that the petitioner has shown the ability to pay the wage from the priority date onwards. This is incorrect. Again, the AAO must examine whether the petitioner has shown an ability to pay the proffered wage in each year from the priority date onwards, and dismiss the appeal if it has not.

In addition, counsel asserted that the AAO should consider the petitioner's various bank statements submitted into the record as evidence of its ability to pay the wage. This assertion is misplaced. First, bank checking account statements are not among the three types of evidence, enumerated at 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional evidentiary material "in appropriate cases," as noted by counsel on appeal, here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner.[5] Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

The AAO notes that to support the assertion that this office should consider the bank statements in the record as evidence of the petitioner's ability to pay the wage, counsel referred to two nonprecedent decisions of the AAO.[6] The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all USCIS employees in the administration of the Act.[7] However, nonprecedent decisions are not binding. *See R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), aff'd 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated).

Counsel indicated further that the AAO should consider the petitioner's "projected" 2007 net income statement submitted into the record as evidence of its ability to pay the wage in that year.[8] This is incorrect. This statement is not audited. The AAO cannot rely on the petitioner's unaudited financial statements. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Likewise, this office will not consider the financial information on the various annual financial compilations prepared

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[5] Counsel also pointed out that in *Matter of Sonegawa*, 12 I&N Dec. 612, the INS, now USCIS, considered evidence beyond that listed in the regulations when analyzing the petitioner's ability to pay the wage. However, again, counsel did not demonstrate why the documentation listed in the regulations somehow paint an inaccurate picture of the petitioner's financial position, as the petitioner did in *Sonegawa*.

[6] Counsel did not submit copies of these decisions which apparently date back to 1994 and 1995, respectively.

[7] Also, the regulation at 8 C.F.R. § 103.9(a) indicates that precedent decisions must be designated and published in bound volumes or as interim decisions.

[8] There is no indication on this statement who compiled this financial information, which is listed on the petitioner's letterhead stationery.

by Certified Public Accountants (CPAs) and submitted with the petition, which are also not audited.

On appeal, counsel also suggested that if the petitioner is able to show that it consistently met its payroll obligations during the relevant period of analysis, then it has demonstrated an ability to pay the instant wage from the priority date onwards. This is incorrect. The petitioner must show that it had funds available to pay the proffered wage and the added expense of the salaries of its other sponsored workers' wages, each year from the priority date year onwards. *See* 8 C.F.R. § 204.5(g)(2).

In addition, the petitioner's Chief Executive Officer (CEO) and counsel have indicated that the petitioner is a wholly owned subsidiary of a company in Switzerland. The petitioner has also submitted financial information related to the Swiss company that owns the petitioner. Any suggestion that the AAO should view financial statements of this company as listing funds that are available to pay the wage is misplaced. A corporation is a separate and distinct legal entity from its owners and shareholders; therefore, the assets of its shareholders or of other enterprises or corporations cannot 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner's CEO and counsel have also indicated that the royalties which the petitioner paid to the Swiss company which owns it should be considered funds available to pay the wage. The petitioner's CEO and counsel have asserted that these royalties are transferred to the Swiss company only after the petitioner's salaries and its other expenses are paid in full. However, line 28 of the petitioner's 2005 Form 1120 indicates that the petitioner suffered a loss of $222,908 in 2005. Yet, the petitioner paid royalties of $303,184 to the company in Switzerland which owns it in 2005, according to page 1, Statement 2 of the Federal Statements, (regarding Form 1120, Line 26, Other Deductions), attached to the petitioner's 2005 Form 1120. Thus, evidence in the record indicates that royalties are paid to the company in Switzerland before the petitioner has met all its expenses and obligations. Moreover, the Swiss company's balance sheet for 2004 and 2005 is in the record, and on the "Annex to [the] 2005 Balance Sheet," the Swiss company indicated that the petitioner is not paying down its debt to the parent company. The Swiss company then underscored that the petitioner has excessive debt and various debtor claims and that there is a risk that the Swiss company will not be able to collect on its loan to the petitioner. This evidence indicates that the petitioner pays royalties to the company in Switzerland which owns it before it is allowed to meet the expense of paying down its debt to this Swiss company and of paying down other debts. Thus, the record indicates that the petitioner must pay royalties to the company in Switzerland which owns it, before it meets its various expenses and obligations.

Finally, even if the petitioner could establish that it may at times withhold some of the royalties paid to the company in Switzerland, no documentary evidence was submitted to support the assertion that all the officers of the Swiss company had agreed to forego the royalties paid by the

petitioner to the extent needed to cover the instant wage and any other of the petitioner's sponsored workers' wages, from the priority date onwards, if the petitioner were not able to do so out of its own funds. For example, there is no notarized, sworn statement from the officers of this Swiss company in the record which attests to the specific amount of royalties that that company received from the petitioner during the relevant period and the specific amount that the company would be willing and able to forego, in order to cover the beneficiary's wages and any other sponsored workers' wages. Going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's assertions made in these proceedings do not outweigh the evidence in the tax returns in the record which fails to establish that, from the priority date onwards, the petitioner has had the continuing ability to pay the instant proffered wage as well as the wages of its other sponsored workers for whom it had a petition pending during all or part of the relevant period.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage, as requested by counsel. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the record indicates that the petitioner was incorporated in 1991 and that it currently has 17 employees. The petitioner did not establish its historical growth since incorporating. Its gross receipts have not steadily increased, but have fluctuated as follows: $3,257,667 in 2003; $3,667,435 in 2004; $3,245,916 in 2005; $4,883,353 in 2006; $3,099,483 in 2007; and $2,851,332 in 2008. The petitioner asserted through counsel on page 6 of the appeal brief that the Swiss software company which owns it has "more installations than any other software company in the

world within the Textile industry." However, there is no independent, documentary evidence in the A-file to support this assertion. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Unsupported assertions of counsel and the petitioner are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, there is no evidence in the record that the petitioner, itself, enjoys any particularly strong reputation within its industry in the United States, where it operates. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, or whether the beneficiary will be replacing a former employee or an outsourced service. Also, from 2007 onwards, the petitioner has the added expense of the salary of an additional sponsored worker for which it did not show a continuing ability to pay during the relevant period. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not shown that it had the continuing ability to pay the proffered wage or any of its other sponsored workers' wages from the priority date onwards.

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.