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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: DEC 17 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

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 sustained. The petition will be approved.

The petitioner, [redacted], is an optical instruments and goods company. It seeks to employ the beneficiary permanently in the United States as a glass cutter. 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 beginning on the 2002 priority date of the visa petition. The director denied the petition accordingly.

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 February 21, 2009 denial, the single issue in this case is whether or not 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 August 12, 2002. The proffered wage as stated on the Form ETA 750 is $11.24 per hour ($23,379.20 per year).[1] The Form ETA 750 states that the position requires 3 months of work experience.[2]

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 upon appeal.[3]

Although the original employer applicant on the Form ETA 750 was [redacted], DOL certified the Form ETA 750 on behalf of [redacted] on June 6, 2007. In response to the director's RFE dated January 27, 2009, former counsel stated that the petitioner had changed names. Apparently this was more than a name change. In correspondence between DOL and the petitioner dated May 23, 2007, the petitioner informed DOL that one of the partners for the petitioner incorporated a new entity called [redacted] which continues [redacted] business at the same location, providing the exact same services. DOL accepted that substantive change.

United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). On appeal, current counsel asserts that [redacted] is the "predecessor-in-interest" to the instant petitioner and submits evidence demonstrating the inventory and assets that it acquired from [redacted]

The AAO notes that current counsel states that the proffered wage for 2002 should be $8.00 an hour as reflected on the original ETA Form 750, and not the prevailing wage of $11.24 as established on the updated ETA Form 750. Counsel cites *Matter of Masonry Masters, Inc V. Thornburgh,* 875 F.2d 898(D.C. Cir. 1989).

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[1] The Department of Labor (DOL) amended the prevailing wage on the certified labor certification from $8 an hour to $11.24 an hour on August 8, 2007. United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Thus, the hourly rate for the proffered position is $11.24 an hour.

[2] The record contains a letter that verifies the beneficiary's three months of prior work experience in 1999 as a glass cutter. The AAO will not discuss the issue further in these proceedings as it finds that this evidence satisfies the applicable regulatory criteria.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case 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).

A petition may not be approved if eligibility is not established at the priority date with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Likewise the AAO cannot consider the prevailing wage at the time the labor certification was filed, rather than the prevailing wage indicated on the date the labor certification when certified. Further, counsel's reference to *Masonry Masters* is not persuasive. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The *Masonry Masters decision* is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage. Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets. In the instant proceedings, the AAO will utilize the proffered wage as identified on the updated Form ETA 750.

As previously noted, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The proffered wage of $11.24 as corrected and certified by DOL must be utilized in these proceedings. Thus, the petitioner has to establish the ability of the original petitioner to pay the certified hourly wage of $11.24 in tax year 2002. As previously noted, the annual wage based on the hourly wage of $11.24 is $23,379.20.

With regard to the beneficiary's wages in 2002, counsel states that the beneficiary worked for [redacted] since 1999, and that the 2002 Form W-2 was for the entire year. Counsel stated that neither he nor the petitioner knew why former counsel had indicated that the beneficiary had not worked for [redacted] prior to the March 2002 priority date. Counsel submits ADP Earnings Statements for the beneficiary from [redacted] from January 31, 2002 to December 30, 2002. All pay stubs indicate an hourly wage of $8.00 an hour, and the yearly total of wages as of December 20, 2002 was $15,712.

Both [redacted] were and are structured as S Corporations. On the petition, the petitioner claimed to have been established in April 22, 2003, to have a gross annual income of $888,273, and to currently employ 33 workers. According to the tax returns in the record, [redacted] fiscal years are based on a calendar year. On the Form ETA 750B, signed by the beneficiary on August 6, 2002, the beneficiary did not claim to have worked for [redacted]

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, United States Citizenship and Immigration Services (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).

On appeal, counsel submits [redacted] bank statements for three checking accounts for tax years 2006, 2007, and 2008.[4] Counsel first identifies the petitioner's average monthly ending balances for all three bank accounts for tax years 2006 and 2007. Counsel then notes the difference between the beneficiary's actual monthly wages and the proffered wage on a monthly basis for these two years. Counsel states that the petitioner had sufficient funds in the three bank accounts to cover the monthly difference between the beneficiary's actual wages and the proffered wage. Counsel identifies these monthly differences as $137.50 in 2006 and $542 in 2007.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 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 material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel suggests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2002. The AAO, however, will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months

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[4] These bank accounts are as follows: [redacted] response to the AAO RFE, the petitioner submitted an advertisement for a company in [redacted] Since the record does not reflect the actual status of [redacted] whether it is a separate business owned by the petitioner's owner, with separate income tax returns, the AAO will not examine further the bank statements for [redacted] these proceedings. Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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."

of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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.

The petitioner has to establish that [redacted] had the ability to pay the proffered wage of $23,379.20 as of the priority date of August 12, 2002 to April 22, 2003, the date the assets of [redacted] were acquired by [redacted] and the date on which [redacted][5] [redacted] has to establish its ability to pay the proffered wage from April 23, 2003 until the beneficiary obtains lawful permanent residency.

On appeal, the petitioner submits the beneficiary's 2002 Form W-2 Wage and Tax Statement summary indicating that [redacted] paid her $15,712.60. The difference between the beneficiary's actual wages and the proffered wage of $23,279.20 is $7,566.60. Thus the petitioner has to establish that [redacted] had the ability to pay this difference based on its 2002 net income or net current assets.

In response to the director's RFE dated December 17, 2008 the petitioner submitted [redacted] for the beneficiary from the second quarter of tax year 2003 to the third quarter of tax year 2007.[6] The beneficiary's wages indicated by these statements are as follows: $11,539 in 2003; $14,615 in 2004; $20,727 in 2005; $21,729 in 2006; and $16,886 in 2007.

The petitioner has not established that it employed and paid the beneficiary the full proffered wage of $23,379.20 during any relevant timeframe, including the period from the priority date in 2002 and subsequently. Thus, the petitioner has to establish the ability of [redacted] to pay the difference between the beneficiary's actual wages and the proffered wage of $23,379.20 in tax year 2002 and its own ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2003 and on onward.[7]

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[5] [redacted] in response to the AAO RFE. This document states that [redacted] filed its Articles of Incorporation on April 21, 2003 and that the state of California Secretary of State endorsed the incorporation on April 22, 2003.

[6] The AAO considers the year to date sums listed on the fourth quarter payroll documents for tax years 2003, 2005 and 2006 as the beneficiary's actual wages for these years. For tax year 2004, the petitioner did not submit its fourth quarter employee records for the beneficiary. Therefore the record only reflects year to date earnings as of September 31, 2004.

[7] The difference between the beneficiary's claimed wages in 2002 and her actual wages and the proffered wage in tax years 2002 to 2007 is as follows: $7,566.20 in 2002; $11,840 in 2003;

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced. 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 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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.

$8,764.20 in 2004; $2,652.20 in 2005; $1,650.20 in 2006; and $6,493.20 in 2007.

River Street Donuts at 118. "[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).

The record before the director closed on January 28, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due; however, on appeal, the petitioner submitted its 2008 tax return. The AAO will include this tax return in its consideration of [redacted] net income and net current assets and also in the discussion of the petitioner's totality of circumstances.

The AAO notes that the record contains [redacted] 2002 Form 1120S. The AAO will also examine [redacted] 2003 to 2008 tax returns to determine whether the instant petitioner has established its ability to pay the difference between the beneficiary's actual wages and the proffered wage, based on its net income or net current assets.

- In 2002, the Form 1120S for [redacted] stated net income[8] of -$78,292.

For tax years 2003 to 2008, [redacted] had the net income shown in the table below.

- In 2003, the Form 1120S stated net income of -$107,936.
- In 2004, the Form 1120S stated net income of -$141,164.
- In 2005, the Form 1120S stated net income of $13,043.
- In 2006, the Form 1120S stated net income of -$165,167.
- In 2007, the Form 1120S stated net income of -$30,206.
- In 2008, the Form 1120S stated net income of -$38,208

Therefore, for the year 2002, [redacted] did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. For tax years 2003, 2004, 2006, 2007, and 2008, [redacted] did not have sufficient net income to pay the difference between the

[8] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for tax years 2006 and 2008, the petitioner's net income is found on Schedule K of its tax return for these years. For the remaining years, [redacted] net income is found on line 21, of the Form 1120S.

beneficiary's actual wages and the proffered wage. In 2005, [redacted] had sufficient net income to pay the difference between the beneficiary's wages and the proffered wage, namely, $2,652.20.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets.[9] Net current assets are the difference between the petitioner's current assets and current liabilities.[10] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.

[redacted] tax return for 2002 indicates net current assets of -$42,848. [redacted] demonstrates its end-of-year net current assets for 2003 to 2008, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of $164,839.
- In 2004, the Form 1120S stated net current assets of $147,527.
- In 2006, the Form 1120S stated net current assets of -$182,232.
- In 2007, the Form 1120S stated net current assets of -$164,047.
- In 2008, the Form 1120S stated net current assets of $150,271.

Therefore, for the year 2002, [redacted] did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, or $7,566.20. In tax years 2006, and 2007, [redacted] did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage. In tax years 2003, 2004, and 2008, [redacted] demonstrated sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.[11]

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of

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[9] Former counsel, in response to the director's RFE dated December 17, 2008 incorrectly stated that the petitioner's total assets listed at line 15, Schedule L were sufficient in tax years 2001 to 2007 to establish the petitioner's ability to pay the proffered wage.

[10] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[11] The AAO notes that USCIS computer records indicate the petitioner filed one additional petition during the relevant period of time: an I-129 petition filed in 2008 for a non-immigrant one year period in H-3 status. The petitioner's net current assets in 2008 appear sufficient to both pay a second wage as well as the difference between the beneficiary's actual wages and the proffered wage in 2008.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, with the exception of tax years 2003, 2004, 2005, and 2008.

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. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 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.

On appeal counsel submits a letter from [redacted] dated January 19, 2010. [redacted] states that the beneficiary has worked for him for over ten years with a starting date of June 7, 1999. [redacted] also states that he was a founding officer of both [redacted] and a founding officer of [redacted] states that his capacity with [redacted] and that his capacity with [redacted] is [redacted] states that record will show that the petitioner is not only a viable entity but has grown 20 to 25 percent annually from its incorporation and now employs more than 40 people doing business in many major sectors of the U.S. economy.

[redacted] refers to the 2003 incorporation date of [redacted] notes that the address for both companies is [redacted] and states that he has been in the building since [redacted] and recently signed another lease to keep the company at this address until 2012.

With regard to issues such as the petitioner's business operations, the record contains [redacted] tax returns for tax years 2001 and 2002. The record reflects that [redacted] inventory and assets were auctioned off to one of the original petitioner's officers. [redacted] employed the beneficiary as of its

2003 incorporation date and onward. The I-140 petition indicates the petitioner has 32 employees, and on appeal, [redacted] indicates the petitioner now has 45 employees. The advertisements submitted by the petitioner's accountant and registered agent of incorporation indicate that the petitioner has taken on further business operations in the optics and coatings field.

The tax returns submitted to the record reflect that [redacted] had gross receipts of $1,078,263 in 2002,[12] and in 2003, [redacted] had gross receipts of $575,448. For tax years 2004 to 2008, the I-140 petitioner has significant and primarily increasing gross receipts of $1,185,661; $2,156,342; $2,151,201; $2,612,379; and $3,060,977, respectively.

With regard to the level of wages and salaries paid in the relevant period of time, the record reflects that [redacted] paid wages of $7,272 and officer compensation of $15,100, with cost of labor of $326,928 (identified at Schedule A, line 3) in 2002. [redacted] paid wages and salaries of $29,625 and cost of labor of $168,572 in 2003; wages and salaries of $148,650 with cost of labor of $391,188 in 2004; salaries and wages of $229,651 and costs of labor $660,072 in 2005; wages and salaries of $255,832 and cost of labor of $663,427 in 2006; wages and salaries of $298,531 and cost of labor of $732,011 in 2007; and wages and salaries of $341,260 with $993,305, direct labor costs identified at Statement 3, Schedule K, line 5, in 2008.

The record reflects a decrease in salaries and gross receipts in 2003, the year in which the business changed hands;[13] however, the years before 2003 indicate increasing profits and wages, as do the subsequent years 2004 to 2008. The facts in this case are thus analogous to the petitioner in *Sonegawa*, who experienced losses during a year of significant change within the business. The increasing gross profits and wages and salaries for the years 2004 to 2008 do add significant weight to the petitioner's overall totality of circumstances. The AAO notes that [redacted] in a letter written in response to the AAO's RFE, addressed the negative net income of [redacted] states that the petitioner purchased another business, [redacted][14] [redacted] on February 20, 2004. [redacted] states that while [redacted] sees profits from this business, it cost the petitioner money to purchase and assimilate the business into the existing business.

With regard to longevity, the [redacted] was originally incorporated in 1991, a period of twelve years as of the sale of its assets; while [redacted] has been incorporated since 2003, a period of seven years.

Based on the petitioner's business operations, longevity, expansion, gross receipts, and salary and wage levels, the AAO concludes that the petitioner has established its ability to pay the difference

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[12] The AAO notes that the record indicates that [redacted] had gross receipts of $1,346,811 in tax year 2001, the year prior to the August 12, 2002 priority date.

[13] The AAO notes that even in light of the corporate transaction in 2003, the petitioner still demonstrates net current assets in 2003 of $164,839.

[14] [redacted] submitted an advertisement for [redacted] that identifies itself as a subsidiary of [redacted]

between the wages actually paid to the beneficiary and the proffered wage in 2006 and 2007, especially in view of the modest differences between the beneficiary's actual wages and the proffered wage. As previously stated, these differences in 2006 and 2007 are $1,650.20 and $6,493.20. With regard to the 2002 priority year, the difference is $7,566.60.

With regard to the 2002 priority year, as previously stated, [redacted] the year before a partner acquired its assets and formed the petitioning entity, had gross receipts of $1,078,263, and wages of $7,272 and officer compensation of $15,100, with cost of labor of $326,928. The AAO finds that [redacted] based on its gross receipts and wages and salaries paid was a viable business. The AAO notes that based on the auctioneer report submitted to the record in response to its RFE, the current petitioner paid $412,795.91 for business assets of [redacted], a sum significantly higher than many small businesses' annual receipts or net income.

The petitioner presents for the record evidence of the purchase of a business by a founding partner after eleven years of business. The ensuing business then weathered cycles of growth and change, including the acquisition of a second business and has consistently grown by 20 to 25 percent in the relevant years in question. [redacted] has provided credible and comprehensive evidence that it is a viable company that has continued to grow since 2003. The AAO finds that the overall circumstances of the instant petitioner establish that it is a viable business entity. The AAO finds sufficient evidence to approve the instant petition.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.