identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

Date: JUL 20 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a packer and distributor of spices. It seeks to employ the beneficiary permanently in the United States as a manager of operations. 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 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.

The AAO issued a Notice of Derogatory Information/Request for Evidence (NDI/RFE) to counsel and the petitioner on April 27, 2011, informing the parties that a review of the website at https://ourcpa.cpa.state.tx.us/coa/Index.html revealed that the petitioner, [redacted], was not in good standing and that the petitioner's status was listed as "inactive." The status "inactive" is defined at the website https://ourcpa.cpa.state.tx.us/staxpayersearch/salestaxpayer.do as:

> Inactive – The taxpayer does not have an active sales tax permit and is not eligible to purchase items tax-free for resale. You should not accept a resale certificate from a taxpayer that is 'inactive'.

If the petitioner is no longer an active business, the petition and its appeal to this office may have become moot.[1] Therefore, the AAO requested that the petitioner provide evidence it is a business in good standing and that the petitioner had current business activity for 2010 (invoices, most recent bank statement, most recent federal or Texas quarterly wage report, etc.) Further, the petitioner was asked to submit copies of any licenses or permits issued to it to operate the spice packing and distribution facility at [redacted], including evidence that the facility is currently licensed by the United States Department of Agriculture, the state of Texas, or municipal subdivision, as applicable.

In addition, the AAO informed the petitioner that the record did not contain sufficient evidence to establish that it had the continuing ability to pay the beneficiary the proffered wage since the priority date. The AAO acknowledged that the record contained copies of IRS Forms 1040, U.S. Individual Income Tax Return, of the petitioner's owners for 2001 and 2002, as well as the petitioner's IRS

[1] Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if an appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

Forms 1120, U.S. Corporation Income Tax Return, for 2003, 2004, 2005, and 2006. The record was absent any evidence required by the regulations such as federal tax returns or audited financial statements demonstrating the petitioner's ability to pay the proffered wage in 2007, 2008, 2009, and 2010. Thus, the petitioner was asked to provide the AAO with copies of the petitioner's federal tax returns for 2007, 2008, 2009, and 2010.

In response, counsel submits documentation establishing that the petitioner has been returned to "active" status and that it is properly conducting a business in good standing licensed by the state of Texas to operate the spice packing and distribution facility at [redacted] in [redacted]. In addition, counsel provides a statement and supporting documentation addressing the issue of the petitioner's continuing ability to pay the proffered since the priority date. This statement and supporting documentation shall be discussed in detail *infra.*

As set forth in the director's July 28, 2009 denial, the primary 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)(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.

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 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 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 March 27, 2001. The proffered wage as stated on the Form ETA 750 is $74,200.00 per year. The position requires no education, no training, and two years of experience in either the job offered or the related occupation of assistant manager of operations.

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.[2]

On appeal, counsel argued that the petitioner is able to establish that it has continuing ability to pay the proffered wage in the period from 2001 to 2006 with the exception of 2002 and 2004. Counsel noted that the petitioner had been operated as a sole proprietorship in 2001 and 2002 and that the petitioner's owner possessed sufficient personal assets to pay the proffered wage in 2001. Counsel asserted that the petitioner operated as a corporation in 2003, 2004, 2005, and 2006, and that an examination of the petitioner's net income and net assets revealed that it had the ability to pay the proffered wage in all of these years with the exception of 2004. Counsel stated that the director had erred in determining the value of the petitioner's net assets by not including loans to shareholders that were to be collected in less than one year as reflected on line 7 of the petitioner's Schedules L of its tax returns for the period from 2003 to 2006. Counsel noted that an examination of the totality of the circumstances as conducted in the precedent decision *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and the AAO in a separate non-precedent decision, especially in light of the consistent yearly growth in both the petitioner's gross income and the total amount of salaries paid by the petitioner from 2001 to 2006, established that the petitioner had the continuing ability to pay the proffered wage. Counsel submitted a copy of the AAO's non-precedent decision as well as documentation reflecting the personal assets of the petitioner's owner in 2001.

Relevant evidence in the record also includes the petitioner's owner's Forms 1040, U.S. Individual Income Tax Return, for 2001 and 2002, and Forms 1120, U.S. Corporation Income Tax Return, for 2003, 2004, 2005, and 2006.

The evidence in the record of proceeding shows a sole proprietorship filed the Form ETA 750, and a C corporation formed in 2003 filed the petition. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 of each respective year to September 30 of the successive year. On the petition, the petitioner failed to list any pertinent information regarding the date it was established, its gross annual income, or current number of employees. The Form ETA 750B, signed by the beneficiary on March 12, 2001, reflects that the beneficiary worked for the petitioner from September 1992 up through at least March 12, 2001.

In response to the NDI/RFE issued by the AAO on April 27, 2011, counsel submits a statement in which he reiterates his assertion that an examination of the totality of the circumstances, especially in light of the consistent yearly growth in both the petitioner's gross income and the total amount of salaries paid by the petitioner from 2001 to 2009, established that the petitioner had the continuing ability to pay the proffered wage. Counsel includes the petitioner's Form 1120 tax returns for 2007,

---

[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). 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).

2008, and 2009, the petitioner's bank statements for the periods from January 2007 to December 2008 and from January 2010 to April 2011, and Forms W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to the beneficiary in 2009 and 2010. Counsel notes that the petitioner's tax returns for 2010 are currently unavailable as its fiscal year runs from October 1 of each respective year to September 30 of the successive year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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).

As a threshold issue, it must be determined whether the petition is accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). The original employer identified in the Form ETA 750 filed on April 30, 2001 was a sole proprietorship owned by [redacted] This individual apparently ceased operating the business located at [redacted] Texas, at some point in 2003 when the petitioner was formed. In 2008, the petitioner, a separate and distinct Texas corporation filed the petition accompanied by the labor certification filed by the sole proprietor. Consequently, the only way for the petitioning corporation to be able to use a Form ETA 750 approved for a different employer is if the petitioner establishes that it is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

In this matter, the record is devoid of evidence establishing that the petitioning corporation is a successor-in-interest to the employer who filed the labor certification application. Accordingly, the petition must be denied for this additional reason. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c).

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. In the instant case, the record contains Form W-2, Wage and Tax Statements, reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2009 – $13,800.00 ($60,400.00 less than the proffered wage of $74,200.00).
- 2010 – $26,500.00 ($47,700.00 less than the proffered wage of $74,200.00).

While the petitioner has not established that it paid the beneficiary the full proffered wage in 2009 and 2010, the record is absent any evidence including Form W-2 statements reflecting wages paid by the petitioner to the beneficiary from 2001 to 2008 despite the fact that the beneficiary claimed to have worked for the petitioner from 1992 until at least March 12, 2001 on the Form ETA 750B. In addition, it must be noted that record contains a letter from counsel that was submitted in response to the director's RFE issued on May 21, 2009. In this letter, which is dated June 22, 2009, counsel noted that the beneficiary was not working for the petitioner and as a result Form W-2 statements and Forms 1099 MISC, were not available for the period from 2001 to 2008. However, as discussed previously, the record does contain a Form W-2 statement reflecting wages paid by the petitioner to the beneficiary in 2009. These conflicts raise questions regarding the credibility of the beneficiary's employment history with the petitioner as well as the Form W-2 statements contained in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Form W-2 statements as persuasive evidence of wages paid to the beneficiary.

Regardless, assuming the Forms W-2 statements are persuasive evidence, the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid in 2009. Although the petitioner provided a W-2 statement reflecting wages paid by the petitioner to

the beneficiary in 2010, the record is absent any of the types of evidence enumerated in 8 C.F.R. § 204.5(g)(2), annual reports, federal tax returns, and audited financial returns, that would be utilized to calculate whether the petitioner possessed the financial ability to pay the difference between wages paid to the beneficiary and the proffered wage in 2010.

The petitioner was allegedly a sole proprietorship in 2001 and 2002, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

A review of the Form 1040 tax returns of the sole proprietor for 2001 and 2002 reveals that he supported himself, his spouse, and three dependents in each of these years. The record is absent any pertinent evidence demonstrating his annual household expenses for 2001 and 2002. Nevertheless, the proprietor's Form 1040 tax returns reflect the following:

- Proprietor's adjusted gross income (Form 1040, line 33) for 2001 was $58,835.00.
- Proprietor's adjusted gross income (Form 1040, line 35) for 2002 was $67,892.00.

The evidence in the record does not establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage of $74,200 in 2001 and 2002, even without consideration of the his family living expenses in each of these years.

Counsel is correct in asserting that as a sole proprietor, a petitioner's ownership of personal assets should be taken into account when considering his ability to pay the beneficiary the proffered wage. However, the record does not contain any evidence regarding the personal assets of the sole proprietor in 2002, but rather only contains evidence of his personal assets in 2001. This evidence of the sole proprietor's personal assets in 2001 included documentation relating to his home at [redacted] Texas with an estimated market value of $97,220.00 and a remaining mortgage balance of $55,945.00 owed. Nevertheless, it is improbable that he would have liquidated this asset as it appears to be the primary residence of the sole proprietor and his family.

The record contains documentation regarding four separate automobiles owned by the sole proprietor in 2001. However, these four automobiles appear to be personal motor vehicles operated by the sole proprietor owner and family and as such it is unlikely that the automobiles would have been liquidated to pay the proffered wage. In addition, the sole proprietor has failed to provide evidence demonstrating that any liens or encumbrances on these assets would not exceed their respective values.

Counsel provided documentation reflecting the sole proprietor's three separate credit cards with a combined total credit limit of $8,200.00 in 2001. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in credit limits, bank lines, or lines of credit. A limit on a credit card cannot be treated as cash or as a cash asset. Further, a "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms,* 45 (1998).

Counsel provided a bank statement from [redacted] for a joint checking account held by the sole proprietor and his spouse that is dated December 14, 2001 with a balance of $2,382.24, and another bank statement for a checking account held by the spouse of the sole proprietor that is dated December 20 2001 with a balance of with a balance of $1,564.10. However, any reliance on the balance in the sole proprietor's personal 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. Finally, the record is absent any evidence of the sole proprietor's and his family's monthly expenses for the entire relevant period including, but not limited to, lease payments, mortgage payments, vehicle payments, insurance payments, utility payments, child care expenses, etc. Without a detailed listing of the sole proprietor's assets and personal liabilities for both 2001 and 2002 and evidence of his monthly expenses for the entire relevant period, the petitioner cannot establish its continuing ability to pay the proffered wage during those years it was allegedly operated as a sole proprietorship.

As noted above, the petitioner has operated as a C corporation from 2003 up through the current date. 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.

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 petitioner's Form 1120 tax returns for those years it has operated as a C corporation list its net income as shown in the table below.

- In 2003, the Form 1120 stated net income[3] of $754,228.00.
- In 2004, the Form 1120 stated net income of $24,324.00.

[3] 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.

- In 2005, the Form 1120 stated net income of $31,227.00.
- In 2006, the Form 1120 stated net income of $33,156.00
- In 2007, the Form 1120 stated net income of $22,568.00
- In 2008, the Form 1120 stated net income of $23,410.00.
- In 2009, the Form 1120 stated net income of $27,765.00.

Although the petitioner possessed sufficient net income to pay the proffered wage in fiscal year 2003, it did not have sufficient net income to pay the proffered wage in 2004, 2005, 2006, and 2007. Further, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages already allegedly paid in 2008 and 2009.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. 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 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. The Schedule L of the petitioner's Form 1120 tax returns demonstrate its end-of-year net current assets for 2003, 2004, 2005, 2006, 2007, 2008, and 2009 as shown in the table below.

- In 2003, the Schedule L stated net current assets of $38,454.00.
- In 2004, the Schedule L stated net current assets of $47,963.00.
- In 2005, the Schedule L stated net current assets of $58,655.00.
- In 2006, the Schedule L stated net current assets of $65,085.00.
- In 2007, the Schedule L stated net current assets of $15,430.00.
- In 2008, the Schedule L stated net current assets of $44,196.00.
- In 2009, the Schedule L stated net current assets of $61,230.00.

Consequently, the petitioner did have sufficient net current assets to pay the difference between the proffered wage and wages already paid in 2009. Nevertheless, the petitioner did not have sufficient net current assets to pay the proffered wage in 2003, 2004, 2005, 2006, 2007, and 2008. Counsel's statement that the director erred in determining the value of the petitioner's net current assets by not including loans to shareholders that were to be collected in less than one year as reflected on line 7 of the petitioner's Schedules L of its tax returns is without merit. Counsel failed to provide any evidence relating to the specific terms, including a repayment schedule reflecting satisfaction in less than one year, of any loans made by the petitioner to its shareholders in the period from 2003 to

[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.

2009. Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), does not include loans made to shareholders as an item to be included in calculating a corporation's "current assets" regardless of the terms of such loans. Even if line 7 of the petitioner's Schedules L were to be included in establishing the petitioner's net current assets, it must be noted that the petitioner did not list any loans to shareholders on line 7 of the Schedules L in 2003, 2007, 2008, and 2009.

Counsel includes copies of the petitioner's bank statements from [redacted] for a small business checking account for the periods from January 2007 to December 2008 and from January 2010 to April 2011. Nevertheless, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in this account are well below the proffered wage including a negative balance in some months. Finally, it cannot be determined whether the bank records are complete as the statements only include the first page of each respective monthly statement and the statements only relate to a limited portion of that period from 2003 to 2009. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage for these years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL on March 27, 2001, neither the sole proprietor nor the successor corporate petitioner had established the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income, or net current assets, in 2001, 2002, 2004, 2005, 2006, 2007, 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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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.

Counsel contends that the consistent yearly growth in both the petitioner's gross income and the total amount of salaries paid by the petitioner from 2001 to 2009 established that the petitioner had the continuing ability to pay the proffered wage. Although the petitioner's tax returns do establish growth in both the petitioner's gross income and the total amount of salaries paid over this entire period, such growth has not been consistent as gross income decreased when compared to the previous year in 2002 and 2004, and salaries paid decreased when compared to the previous year in 2002, 2004, and 2006.

In the instant case, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa.* Nor has the petitioner included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that is suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. 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.