(b)(6)

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

[redacted]

Date: AUG 0 6 2012 Office: NEBRASKA 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home remodeling company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The 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 March 20, 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)(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 ETA Form 750, Application for Permanent 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 ETA Form 750, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 750 was accepted on April 30, 2001. The proffered wage as stated on the ETA Form 750 is $19.30 per hour ($40,144 per year). The ETA Form 750 states that the position requires 2 years of experience in the job offered.

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.[1]

On appeal, counsel submits a brief; a Notice of Proposed Real Property Assessment for Tax Year 2008 for a property owned by the petitioner; a letter dated May 17, 2009 from Certified Public Accountant; a stock certificate; a page from the petitioner's 2007 federal income tax return; a letter dated February 9, 2009 from and two pages from the petitioner's 2001 federal income tax return.

The record indicates that the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.[2] On the petition, the petitioner claimed to have been established in 1993 and currently to employ no workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 750, signed by the beneficiary on April 20, 2001, the beneficiary claims to have worked for since October 1998.[3]

On appeal, counsel asserts that the petitioner's employment of the beneficiary will allow it to realize more income; that the petitioner has more revenue at its disposal than is reflected on its federal income tax returns; that the director incorrectly derived the petitioner's net income figures for each year from the first page of Form 1065 rather than from Schedule K; and that the petitioner has paid

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[1] 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).

[2] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

[3] It is not clear whether the beneficiary was employed by the petitioner, D/B/A or as a private individual. Form ETA 750B merely indicates that the beneficiary was employed by since October 1998 continuing through the date upon which the beneficiary signed Form ETA 750B, April 30, 2001. The petitioner provided no objective, independent evidence which would clarify which entity employed the beneficiary.

out management fees each year which it could have retained for purposes of paying the beneficiary the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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'l Comm'r 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'l Comm'r 1967).

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 petitioner provided no evidence of having paid the beneficiary any wages at any time. Therefore, the petitioner has not demonstrated that it employed and paid the beneficiary the full proffered wage from the priority date, April 20, 2001, or at any time thereafter.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 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 the Service 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).

The record before the director closed on February 10, 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 is the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated a net loss of $33,645.00.[4]

[4] For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (accessed May 2, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K for each year from 2001 through 2008 has relevant entries for additional income, deductions and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

- In 2002, the petitioner's Form 1065 stated a net loss of $26,010.00.[5]
- In 2003, the petitioner's Form 1065 stated a net loss of $110,361.00.
- In 2004, the petitioner's Form 1065 stated a net loss of $197,343.00.
- In 2005, the petitioner's Form 1065 stated a net loss of $14,783.00.
- In 2006, the petitioner's Form 1065 stated a net loss of $9,954.00.
- In 2007, the petitioner's Form 1065 stated a net loss of $14,352.00.
- In 2008, the petitioner's Form 1065 stated net income of $132,816.00.

Therefore, for the years 2001 through 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage. The only year in which the petitioner demonstrated sufficient net income to pay the proffered wage was 2008.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets as detailed in the table below.

- In 2001, the petitioner's Form 1065, Schedule L stated net current liabilities of $410,487.00.
- In 2002, the petitioner's Form 1065, Schedule L stated net current liabilities of $422,543.00.
- In 2003, the petitioner's Form 1065, Schedule L stated net current liabilities of $566,565.00.
- In 2004, the petitioner's Form 1065, Schedule L stated net current liabilities of $613,445.00.
- In 2005, the petitioner's Form 1065, Schedule L stated net current assets of $0
- In 2006, the petitioner's Form 1065, Schedule L stated net current assets of $0
- In 2007, the petitioner's Form 1065, Schedule L stated net current assets of $0

Therefore, for the years 2001 through 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

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[5] The director erroneously derived the petitioner's net income for each year from line 22 of Form 1065. Since the petitioner reported income, credits, deductions and other adjustments from sources other than a trade or business, the director should have referred to Schedule K for the petitioner's income.

[6] 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.

Thus, from the date the ETA Form 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 the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2008.

On appeal, counsel asserts that the proffered wage for 2001 should have been prorated to account for the priority date of April 30. Thus, rather than having to pay the beneficiary $40,144, counsel claims that the petitioner actually only has to demonstrate the ability to pay $26,763, or 2/3 of the year's salary, for 2001.

We will not, however, 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 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.

Counsel asserts that employing the beneficiary will "allow the company to increase its direct investments in real estate properties in need of serious improvements. [The beneficiary] would make the improvements, and then Soapstone would resell or rent the assets at a substantially higher rate of return than without his services."

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Further, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Counsel asserts that the petitioner has cash which is not reflected on its federal income tax returns. For example, counsel states that the petitioner's income is derived from rent which it charges for properties which it owns as well as from interest from mortgages which it has granted to "other commercial and residential buildings." Counsel states that the "principal repayments [for the mortgages] …are not reflected anywhere in the taxes since principal repayments don't show up in the taxable income nor tax forms."

Any rent payments which the petitioner receives from properties which it owns would be reported as business income on IRS Form 1065. Regarding the principal repayments not appearing on the tax

returns as income, this would not serve to improve the petitioner's financial status. The petitioner initially would have lent the money to a party. That party would now be paying back the money which the petitioner lent. This repayment of the principal would not constitute income. Income would come in the form of the interest on the loan. Counsel has not stated that the interest would not appear on the tax returns. Indeed, if the loan was made by the petitioner, interest on loans which the petitioner granted would be considered business income and would be reported on Form 1065. In fact, these sources of income were reported on Schedule K of Form 1065 which USCIS referenced in identifying the petitioner's net income as explained above. Rent and interest payments would not represent some additional source of income which is not reflected on Form 1065, nor would the repayment of the principal.

Counsel makes reference to other sources of income which the petitioner would have available to it. Counsel states:

> In addition to existing cash flow from rents and interest payments, the company also has various other sources of additional cash at its disposal should it ever need money for new investments and for [the beneficiary's] salary: i) it could borrow money via a first mortgage on the Washington D.C. property…ii) it could get new money from the partners, the Solomons; iii) it could receive money from Coles Farm Enterprises, Inc. ("Coles Farm"). Coles Farms is a second related company, owned 100% by Mr. Daniel Solomon, which operates as an S corporation.

Regarding the petitioner's assertion that it could secure a mortgage on its Washington D.C. property for purposes of paying the beneficiary if necessary, at present the petitioner has not demonstrated that such funds are already available, that is that the petitioner has already secured the loan. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, a line of credit or a loan cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit or a loan as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the loan will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, it is unlikely that a petitioner would encumber real property to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.

1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal, counsel asserts that the petitioner could get money from the partners or from and supports his assertion by referencing the letter from CPA who explains that both companies are owned by the same individuals. However, an LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.[7] *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 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." An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel makes reference to an unpublished administrative decision issued by this office to claim that tax returns are not a reliable indicator of a company's actual income because investment companies such as the petitioner aim to minimize their tax liability "from year to year while it waits for large 'paybacks' on its investments when these investments are sold or come due, as in case of outstanding loans." Counsel points to the unpublished administrative decision to demonstrate how some companies "routinely minimize taxable income by taking it as compensation to avoid double taxation."

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The decision to which counsel makes reference involved a personal (professional) services corporation in which the shareholders have the flexibility to adjust officer compensation for purposes of minimizing tax liability. Further, those shareholders must demonstrate the willingness and ability to forgo some of their compensation to pay the beneficiary. In the instant circumstance, the petitioner is not a personal services corporation and the petitioners have not demonstrated officer compensation which might have been available for purposes of paying the beneficiary during any of the years under consideration.

Counsel asserts "because tax considerations drive a wedge between accounting income and economic income, a company's tax returns are not a reliable basis for determining whether the

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[7] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

company can afford to hire another employee," referencing *Construction and Design Co. v. USCIS*, 563 F. 3d 593 (7th Cir. April 21, 2009) .

First, 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).

Second, *Construction and Design Co.* involves a petitioner which intended to hire an individual whom it had been paying as an independent contractor. That decision addressed the additional costs which the petitioner would incur by employing the individual rather than using his services contractually (e.g. costs for benefits, insurance, etc.). The petitioner has not made the claim that it has been utilizing the services of the beneficiary as an independent contractor and that it now intends to convert him to an employee. Therefore, the arguments based upon *Construction and Design Co.* are misapplied in these circumstances.

Counsel asserts that since the petitioner reports income, credits, deductions or other adjustments from sources other than a trade or business, the director should have referred to Schedule K of Form 1065 on which such items are reported. The AAO concurs with counsel's assertions, as explained above. In the instant circumstance, Schedule K has relevant entries for additional income, additional credits, deductions and other adjustments, so net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In our analysis of the petitioner's income articulated above, the AAO based our determination upon the figures reported on Schedule K. Nevertheless, in basing our analysis on Schedule K, the petitioner has not reported sufficient income to pay the beneficiary the full proffered wage in 2001, 2002, 2003, 2004, 2005, 2006 or 2007. We did note, however, that the petitioner did demonstrate sufficient income to pay the beneficiary the full proffered wage in 2008.

Counsel asserts that the reason that the petitioner reported a loss for each of the years from 2002 through 2007 is due to "management fees" which the petitioner paid to [redacted] the S Corporation which is owned by [redacted] one of the partners in the petitioning enterprise.[8] Counsel explains:

> The explanation for this loss is found on the 2007 Federal Statements Page 1 (the first none [sic] IRS tax form in the 2007 packet – Exhibit D). On that page, Soapstone lists…$105,000 spent on Outside Services fee. The accountant has explained that this figure (called a 'management fee' in other years) 'is not an actual expense, but instead an optional transfer of cash from Soapstone to another entity owned by the same person.' The money was moved via the 'fee' as a book keeping convenience;

[8] Counsel's argument regarding management fees is derived from the letter from CPA [redacted]

> the money did not actually pay for any services. In other words, the money represents an optional excess cash transfer from to the related company.. chose to move the money from to but he could have and, as necessary, would have, left at least the money to pay [the beneficiary] for each year in question had he been able to employ him.

While counsel asserts that the fees paid for "management fees" and "outside services" were paid to simply as "book keeping convenience," he has provided no documentary evidence to substantiate his assertions. The petitioner has not provided the U.S. Income Tax Returns for an S Corporation (Form 1120S) for for any of the years under consideration, no operating agreements describing the purpose for management fees or any other evidence which might identify and substantiate the movement of the funds from the petitioner to and further document the optional nature of the payment of such funds.

Simply 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, counsel's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

In addressing the petitioner's inability to pay the proffered wage in 2001, counsel asserts that "tax records show that the company had Ending Assets in the amount of $35,000 in cash; this is more than enough money to pay the annually prorated salary…"

The AAO has already addressed salary proration above. Regarding the $35,000 in cash assets, this figure represents one type of current assets. However, in determining a petitioner's ability to pay, USCIS considers the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[9] 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. USCIS would not isolate one type of current assets without taking into consideration the petitioner's current liabilities.

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

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[9]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.

(Reg'l Comm'r 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.

In the instant case, the petitioner claims to have been operating for 14 years at the time the instant petition was filed. The petitioner has supplied financial documentation for eight years. In all but one of the years, the petitioner reported a net loss. The petitioner's gross receipts have been marginal to nonexistent. The petitioner has reported neither officer compensation nor wages paid to any employees. The petitioner has not established the historical growth of the business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.