



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

NOV 10 2010

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and development firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish ability to pay the proffered wages to the beneficiaries of the approved and pending petitions including the instant beneficiary as of the priority date and to the present.

The record shows that the appeal is properly and timely filed, 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 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<sup>1</sup> as well as all evidence submitted with another petition.<sup>2</sup>

The regulation 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 establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer

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<sup>1</sup> 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).

<sup>2</sup> While the instant appeal is pending with the AAO, on March 10, 2010, the petitioner filed another I-140 immigrant petition [REDACTED] on behalf of the instant beneficiary and the petition was approved by the Nebraska Service Center director on March 16, 2010.

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, U.S. 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The ETA Form 9089 was accepted on August 7, 2006 and certified on August 11, 2006 by DOL for the instant beneficiary. The proffered wage as stated on the ETA Form 9089 is \$46.54 per hour (\$96,803.20 per year). On the petition, the petitioner claims that it has been established in 1998, has a gross annual income of \$2,672,122, a net annual income of \$113,000 and 52 employees.

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 submitted the beneficiary's W-2 forms for 2004 through 2006 and paystubs for 2007. The record also contains the beneficiary's W-2 form for 2009 and paystubs for 2010 submitted with the other petition. The beneficiary's W-2 forms for 2004 and 2005 are not necessarily dispositive since the priority date in this matter falls in 2006. The beneficiary's W-2 form for 2006 from [REDACTED] is not relevant here because wages paid by another employer cannot be used in determining the petitioner's ability to pay the proffered wage. The beneficiary's W-2 forms from the petitioner show that the petitioner paid the beneficiary \$8,864.59 in 2006 and \$64,790.21 in 2009. The beneficiary's paystubs submitted in the record show that the petitioner paid the beneficiary \$2,615.36 bi-weekly and the year-to-date earnings as of October 28, 2007 were \$60,654.34. However, the petitioner did not submit the beneficiary's W-2 form for 2007 to USCIS or on appeal, even though the beneficiary's W-2 Form for 2007 should be available. Therefore, it is not clear whether the petitioner continued to pay the beneficiary at the same level to the end of the year. The record does not contain the beneficiary's W-2 form or paystubs for 2008. The beneficiary's paystubs for 2010 show that the petitioner paid the beneficiary \$3,280 bi-weekly and the year-to-date earnings as of February 27, 2010 were \$14,405.96. If the petitioner continues to pay the beneficiary at the same level of salary to the end of the year, the petitioner will pay the beneficiary a total of \$85,280 in 2010. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage as of the priority date through the examination of wages already paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the full proffered wage of \$96,803.20 in 2008 and the difference of \$87,938.61 in 2006, \$36,148.86 in 2007, \$32,012.99 in 2009 and \$11,523.20 in 2010 between wages actually paid to the beneficiary and the proffered wage respectively.

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 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is 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 the Service should have considered income before expenses were paid rather than net income.

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

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.<sup>3</sup> 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 record contains copies of Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns filed by the petitioner for 2006 and 2008. The petitioner's tax returns demonstrate its net income and net current assets for these two years, as shown in the table below.

- In 2006, the Form 1120 stated net income<sup>4</sup> of \$68,125 and net current assets of \$385,539.
- In 2008, the Form 1120 stated net income of \$424,113 and net current assets of \$578,657.

For the year of 2006, the petitioner had sufficient net current assets to pay the instant beneficiary the difference of \$87,938.61 between wages actually paid to the beneficiary and the proffered wage.

For the year of 2007, the petitioner did not submit regulatory-prescribed evidence such as annual reports, tax returns or audited financial statements on appeal despite that it should be available at that time. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay the proffered wage for 2007 because it failed to submit regulatory-prescribed evidence.

For the year of 2008, the petitioner had sufficient net income or net current assets to pay the instant beneficiary the full proffered wage of \$96,803.20 that year.

For the years of 2009 and 2010, the record does not contain any regulatory-prescribed evidence such as annual reports, tax returns or audited financial statements for these years. Therefore, it is not clear whether the petitioner had and has sufficient net income or net current assets to pay the difference of

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>4</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28, Taxable income before net operating loss deduction and special deductions, of the Form 1120, U.S. Corporation Income Tax Return.

\$32,012.99 in 2009 and \$11,523.20 in 2010 between wages actually paid to the beneficiary and the proffered wage respectively.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the instant 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 2006 and 2008.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed a total of 447 immigrant and nonimmigrant petitions. For those I-140 immigrant petitions, the petitioner was obligated to pay 10 proffered wages in 2006, 35 in 2007, 42 in 2008, 46 in 2009 and 45 in 2010<sup>5</sup> in addition to the instant beneficiary.

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<sup>5</sup> USCIS records show that the 49 approved immigrant petitions related to the ability to pay the proffered wage in this matter are as follows:

- [REDACTED] filed for [REDACTED] on January 26, 2004 with the priority date of June 25, 2002, and approved on July 11, 2005. The beneficiary was adjusted to lawful permanent resident status on December 4, 2006.
- [REDACTED] filed for [REDACTED] on October 27, 2004 with the priority date of January 16, 2004, and approved on June 7, 2005. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on May 20, 2005 with the priority date of July 25, 2002, and approved on September 20, 2005. The beneficiary was adjusted to lawful permanent resident status on January 23, 2009.
- [REDACTED] filed for [REDACTED] on April 17, 2006 with the priority date of September 2, 2005, and approved on April 26, 2006. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on June 26, 2006 with the priority date of June 27, 2001, and approved on February 21, 2007. The beneficiary was adjusted to lawful permanent resident status on October 30, 2007.
- [REDACTED] filed for [REDACTED] on November 16, 2006 with the priority date of June 3, 2004, and approved on March 12, 2007. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on February 15, 2007 with the priority date of August 28, 2006, and approved on July 16, 2007. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on February 21, 2007 with the priority date of August 25, 2006, and approved on March 20, 2007. USCIS records show that the beneficiary's I-485

adjustment of status application is pending with USCIS.

- [REDACTED] filed for [REDACTED] on April 6, 2007 with the priority date of June 3, 2004, and approved on April 11, 2007. The beneficiary was adjusted to lawful permanent resident status on March 19, 2010.
- [REDACTED] filed for [REDACTED] on May 31, 2007 with the priority date of February 20, 2004, and approved on June 7, 2007. The beneficiary was adjusted to lawful permanent resident status on August 1, 2008.
- [REDACTED] filed for [REDACTED] on June 22, 2007 with the priority date of May 24, 2007, and approved on June 27, 2007. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on June 25, 2007 with the priority date of March 14, 2007, and approved on June 28, 2007. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on August 28, 2007 with the priority date of March 15, 2007, and approved on April 28, 2008.
- [REDACTED] filed for [REDACTED] on August 28, 2007 with the priority date of June 16, 2007, and approved on December 30, 2008.
- [REDACTED] filed for [REDACTED] on August 31, 2007 with the priority date of June 22, 2007, and approved on December 16, 2008.
- [REDACTED] filed for [REDACTED] on September 4, 2007 with the priority date of June 16, 2007, and approved on December 4, 2008.
- [REDACTED] filed for [REDACTED] on September 24, 2007 with the priority date of March 7, 2007, and approved on May 21, 2008.
- [REDACTED] filed for [REDACTED] on September 24, 2007 with the priority date of April 3, 2007, and approved on July 2, 2008.
- [REDACTED] filed for [REDACTED] on September 28, 2007 with the priority date of June 25, 2007, and approved on December 4, 2008.
- [REDACTED] filed for [REDACTED] on September 25, 2007 with the priority date of June 19, 2007, and approved on October 22, 2008. USCIS records show that the beneficiary's I-485 adjustment of status application is pending with USCIS.
- [REDACTED] filed for [REDACTED] on October 1, 2007 with the priority date of June 20, 2007, and approved on December 4, 2008.
- [REDACTED] filed for [REDACTED] on October 2, 2007 with the priority date of July 27, 2007, and approved on June 13, 2008.
- [REDACTED] filed for [REDACTED] on October 3, 2007 with the priority date of June 30, 2007, and approved on July 30, 2008.
- [REDACTED] filed for [REDACTED] on October 4, 2007 with the priority date of July 3, 2007, and approved on February 29, 2008.
- [REDACTED] filed for [REDACTED] on October 5, 2007 with the priority date of July 31, 2007, and approved on July 16, 2008.
- [REDACTED] filed for [REDACTED] on October 5, 2007 with the priority date of July 27, 2007, and approved on September 9, 2008.
- [REDACTED] filed for [REDACTED] on October 5, 2007 with the priority date of July 31, 2007, and approved on November 8, 2008.

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- [REDACTED] filed for [REDACTED] on October 9, 2007 with the priority date of July 29, 2007, and approved on December 12, 2008.
  - [REDACTED] filed for [REDACTED] on October 10, 2007 with the priority date of June 29, 2007, and approved on November 12, 2008.
  - [REDACTED] filed for [REDACTED] on October 12, 2007 with the priority date of July 31, 2007, and approved on December 5, 2008.
  - [REDACTED] filed for [REDACTED] on October 15, 2007 with the priority date of July 27, 2007, and approved on August 2, 2008.
  - [REDACTED] filed for [REDACTED] on November 26, 2007 with the priority date of March 2, 2007, and approved on June 7, 2008.
  - [REDACTED] filed for [REDACTED] on February 22, 2008 with the priority date of November 29, 2007, and approved on September 8, 2008.
  - [REDACTED] filed for [REDACTED] on March 7, 2008 with the priority date of October 3, 2007, and approved on December 4, 2008.
  - [REDACTED] filed for [REDACTED] on March 11, 2008 with the priority date of October 15, 2007, and approved on September 5, 2008.
  - [REDACTED] filed for [REDACTED] on March 14, 2008 with the priority date of January 31, 2008, and approved on December 4, 2008.
  - [REDACTED] filed for [REDACTED] on March 18, 2008 with the priority date of August 24, 2007, and approved on September 8, 2008.
  - [REDACTED] filed for [REDACTED] on March 25, 2008 with the priority date of February 4, 2008, and approved on December 5, 2008.
  - [REDACTED] filed for [REDACTED] on July 25, 2008 with the priority date of July 25, 2008, and approved on October 2, 2008.
  - [REDACTED] filed for [REDACTED] on October 3, 2008 with the priority date of March 7, 2008, and approved on May 18, 2009.
  - [REDACTED] filed for [REDACTED] on November 7, 2008 with the priority date of March 10, 2008, and approved on April 27, 2009.
  - [REDACTED] filed for [REDACTED] on March 20, 2009 with the priority date of May 22, 2008, and approved on June 8, 2009.
  - [REDACTED] filed for [REDACTED] on June 3, 2009 with the priority date of August 4, 2008, and approved on August 28, 2009.
  - [REDACTED] filed for [REDACTED] on August 6, 2009 with the priority date of October 31, 2008, and approved on October 15, 2009.
  - [REDACTED] filed for [REDACTED] on April 2, 2010 with the priority date of May 11, 2009, and approved on April 7, 2010.
  - [REDACTED] filed for [REDACTED] on April 12, 2010 with the priority date of May 6, 2009, and approved on April 14, 2010.
  - [REDACTED] filed for [REDACTED] on May 7, 2010 with the priority date of February 26, 2009, and approved on June 16, 2010.
  - [REDACTED] filed for [REDACTED] on June 14, 2010 with the priority date of February 20, 2009, and approved on August 4, 2010.
  - [REDACTED] filed for [REDACTED] on July 12, 2010 with the priority date of March 4, 2009, and approved on September 22, 2010.

On appeal, counsel asserts that the petitioner paid the full proffered wages to all seven beneficiaries in 2006, 32 out of 35 beneficiaries in 2007 and 34 out of 35 in 2008. However, counsel did not submit the beneficiaries' W-2 forms or other documentary evidence to support his assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Therefore, the petitioner failed to demonstrate that it paid all other beneficiaries their proffered wages in the relevant years.

As previously indicated, the petitioner was responsible to demonstrate its ability to pay 10 proffered wages in 2006. The total proffered wages the petitioner was responsible in 2006 were \$625,905.68.<sup>6</sup> Therefore, the petitioner's net income of \$68,125 or net current assets of \$385,539 was not sufficient to pay all proffered wages in 2006, and thus, the petitioner failed to establish its ability to pay all proffered wages that year.

In 2007, the petitioner was responsible for paying 35 additional proffered wages. The total proffered wages were \$2,047,908.84.<sup>7</sup> The record does not contain the petitioner's annual reports, tax returns or audited financial statements for 2007. Therefore, the petitioner failed to establish its ability to pay all proffered wages in 2007 because it failed to submit any regulatory-prescribed evidence for that year.

In 2008, the petitioner was responsible for paying 42 additional proffered wages. The total proffered wages were \$2,454,650.05.<sup>8</sup> Therefore, the petitioner's net income of \$424,113 and net current assets of \$578,657 was not sufficient to pay all proffered wages in 2008, and thus, the petitioner failed to establish its ability to pay all proffered wages that year.

The record does not contain evidence showing that the petitioner paid all proffered wages in 2009 and 2010 or that the petitioner had sufficient net income or net current assets to pay all proffered wages in these two years.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay all beneficiaries their proffered wages as

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<sup>6</sup> The total six proffered wages counsel provided information were \$375,543.40. For the four counsel did not provide proffered wage information, this office adopts the average figure (\$62,590.57 per year) of those six proffered wages as the proffered wage.

<sup>7</sup> The total 32 proffered wages counsel provided information were \$1,872,373.80. For the three beneficiaries without proffered wage information, this office adopts the average figure (\$58,511.68 per year) of those 32 proffered wages as the proffered wage.

<sup>8</sup> The total 37 proffered wages counsel provided information were \$2,162,429.80. For the five beneficiaries without proffered wage information, this office adopts the average figure (\$58,444.05 per year) of those 37 proffered wages as the proffered wage.

of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 failed to establish its ability to pay all proffered wages for every relevant year and even for the single instant beneficiary for 2007. In addition, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 wages.

The record contains bank statements for the petitioner's business checking account. Counsel's reliance on the balance of the petitioner's bank account 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 was considered in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot overcome the grounds of the director's denial that the petitioner failed to demonstrate that it had the ability to pay the proffered wages during the year of the priority date and subsequent years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wages beginning on the priority date to the present.

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.