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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 01 2009
LIN 07 264 59158

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an engineering services company. It seeks to employ the beneficiary permanently in the United States as an Administrative Services Manager. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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.

As set forth in the director's 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, 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 9089, 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 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on July 8, 2007. The proffered wage as stated on the ETA Form 9089 is per year. The ETA Form 9089 states that the position requires a bachelor's degree in management and six months of experience in the job offered.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] Evidence in the record includes the petitioner's Forms 1120S, U.S. Income tax return for an S Corporation, for the years 2004 through 2008;[2] the petitioner's business checking account statement from December 31, 2007; an affidavit signed by the petitioner's majority shareholder, a copy of the 2007 Form 1040, U.S. individual income Tax Return for and a copy of a portfolio summary for dated December 31, 2007.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 15, 2007, the beneficiary claimed to have worked for the petitioner from February 20, 2006 to February 5, 2007.

On appeal, counsel asserts that, in 2007, the petitioner made a payment of to a pension fund, the beneficiaries of which are and his spouse. Counsel states that this was a discretionary transfer of funds which the petitioner could have used to pay the proffered wage in 2007. Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in stating that the petitioner has established its ability to pay the proffered wage in light of the "totality of the circumstances." Specifically, counsel notes that the petitioner has been in business in its current corporate form since 2001; that the petitioner's net income exceeded the proffered wage in 2004, 2005 and 2008; and that there is an expectation of improvement in the economy and substantial government support for sustainable technologies.

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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] As noted above the petitioner is only required to establish its ability to pay the proffered wage as of the priority date, which in this case is July 8, 2007. Thus, the petitioner is not required to establish its ability to pay the proffered wage in 2004, 2005 or 2006. However, the petitioner's tax returns from those years will be considered generally in determining the petitioner's ability to pay the proffered wage.

[3] The record indicates that was the petitioner's sole shareholder until 2009, at which time he transferred a 10% ownership share to his wife,

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application 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 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).

It is noted that the instant case arose in the seventh circuit. Therefore, in this case, the AAO is bound by precedent decisions of the circuit court of appeals for the seventh circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*. 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

The seventh circuit court of appeals recently issued a precedent decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit directly addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to employ the beneficiary at a salary of over [redacted] per year.[4] The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.[5] The court also noted that the owner of the corporation received officer compensation of approximately [redacted][6]

In considering the employer's ability to pay the proffered wage, the court stated that if an employer "has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure."[7]

The court then turned to an examination of the USCIS method for determining an employer's ability to pay the proffered wage. The court noted that USCIS "looks at a firm's income tax returns and balance sheet first."[8] The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."[9] The court found that

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[4] 563 F.3d at 595.
[5] Id.
[6] Id.
[7] Id.
[8] Id. at 596.
[9] Id.

the employer had failed to establish that it had sufficient resources to pay the proffered wage "plus employment taxes (plus employee benefits, if any)."[10]

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method, which is described in detail below, involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." As noted above, because the instant case arose in the seventh circuit, the AAO is bound by the seventh circuit's decision in *Construction and Design*. Therefore, pursuant to the decision in *Construction and Design*, the petitioner in the instant case must establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.[11] In this case, as noted above, the proffered wage as stated on the ETA Form 9089 is [redacted] **per year. Using the OMB-approved formula, the "fully** burdened" wage rate in this case equates to $47,000.80 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must establish its ability to pay $47,000.80 per year.

As stated above, 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 has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 or subsequently.[12]

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[10] Id.

[11] The 1.4 multiplier is from the Bureau of Labor Statistics 2009:
[redacted]

[12] As noted above, the ETA Form 9089 indicates that the beneficiary was employed by the petitioner from February 20, 2006 to February 5, 2007. The beneficiary also indicated on a Form G-325A,

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). *See also, 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.

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.

Biographic Information sheet submitted with her Application to Register Permanent Residence or Adjust Status on Form I-485, that she was employed by the petitioner from February 2006 to February 2007. However, the record does not contain any evidence, such as a Form W-2 or pay stubs, to establish that the petitioner employed and paid the beneficiary at any time.

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).

The record before the director closed on March 16, 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 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2007 and 2008, as shown in the table below.

- In 2007, the Form 1120S stated net income[13] of
- In 2008, the Form 1120S stated net income[14] of

The petitioner did not have sufficient net income to pay the proffered wage in 2007, nor did it have sufficient net income to pay the "fully burdened" wage of $ per year.[15] Although the petitioner had sufficient net income to pay the proffered wage of in 2008, it has failed to establish that its net income was sufficient to cover the "fully burdened" wage rate, as required by *Construction and Design*. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see also Construction and Design*, 563 F,3d at 596. If the initial evidence does not demonstrate eligibility for the benefit sought, USCIS may deny the petition. 8 C.F.R. § 103.2(b)(8).

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

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[13] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (on returns for the years 2006 through 2008) of Schedule K. *See* Instructions for Form 1120S, at (accessed September 15, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In 2007, the petitioner had relevant entries on the Schedule K, thus the net income for 2007 is found on line 18 of its Schedule K for 2007.

[14] Ordinary income (loss) from trade or business activities as reported on Line 21.

[15] Counsel requests that USCIS prorate the proffered wage for the portion of 2007 that occurred after the priority date. The AAO 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.

petitioner's current assets and current liabilities.[16] 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2007 and 2008, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of -$
- In 2008, the Form 1120S stated net current assets of -$

The petitioner did not have sufficient net current assets to pay the fully burdened wage rate for the years 2007 or 2008, as required by *Construction and Design*.

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

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, counsel states that the petitioner transferred to a pension fund in 2007. This is also stated on the affidavit from the petitioner's majority shareholder. Counsel states that this transfer was discretionary and that these funds could have been used to pay the proffered wage in 2007. First, it is noted that this amount is included on the petitioner's 2007 income tax return on Schedule L, line 18 under which lists the petitioner's year-end "other current liabilities" as Line 18 also references "statement 22," which is included with the 2007 return. Statement 22 breaks down the "other current liabilities" figure into its component parts and lists the amount of under the heading "pension payable" for the end of tax year 2007.[17] Thus, the "pension payable" has already been considered in the calculation of the petitioner's net current assets above. It is noted that, even if the "pension payable" figure had been excluded from the calculation, the petitioner's net current assets would have been - which is obviously insufficient to pay the proffered wage.

Further, it appears that counsel has overstated the amount that was transferred to the pension fund in 2007. Although statement 22 lists $52,181 under "pension payable" for the end of tax year 2007, it also lists under "pension payable" at the beginning of tax year 2007. Therefore, it would appear that the increase in pension payable was only in 2007, which is substantially less than the

[16] 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.

[17] Statement 22 also lists in accrued payroll taxes and in accrued state taxes. The combined amounts for pension payable, accrued payroll taxes and accrued state taxes are which is the amount listed on line 18 of Schedule L.

proffered wage. In fact, counsel stated in response to the Request for Evidence (RFE) issued by the director that the petitioner "paid [redacted] into a pension fund" in 2007. Counsel has provided no explanation for these inconsistent statements. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel also noted in his response to the RFE that the petitioner loaned to in 2007.[18] However, this amount is substantially less than the proffered wage and therefore does not establish the petitioner's ability to pay the proffered wage in 2007. Further, the loan to [redacted] reduced the cash available to the petitioner and therefore was not available to pay the proffered wage.

Counsel also noted in his response to the RFE that, in 2007, the petitioner paid [redacted] in officer compensation to [redacted] Counsel stated that this compensation was discretionary spending which could have been used to pay the proffered wage in 2007. However, there is no evidence in the record to establish that [redacted] was willing or able to forego nearly all of his salary in 2007 to pay the proffered wage. 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). Nor is there any evidence that [redacted] would have been able to support himself and his family had he sacrificed nearly his entire salary in 2007. Although [redacted] stated in his affidavit that his personal ongoing liabilities such as mortgage, credit, household and living expenses are far below his personal income, he has not provided any evidence to document this. 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)).

In response to the RFE, counsel also submitted a copy of the petitioner's checking account statement for December 31, 2007. Counsel's reliance on the balance in 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 above in determining the petitioner's net current assets. Finally, even if the bank statement were taken into account, the modest balance in the account [redacted] as of December 31, 2007) would be insufficient to establish the petitioner's ability to pay the proffered wage.

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[18] The amount of the loan is accounted for on line 7 of Schedule L of the petitioner's 2007 tax return under the heading "loans to shareholders." The amount of "loans to shareholders" is listed on line 7 as $78,779 for the beginning of tax year 2007 and [redacted] for the end of tax year 2007, an increase of $6,750.

Finally, in response to the RFE, counsel submitted a copy of a personal investment account statement for Mr. b and his wife dated December 31, 2007. Counsel indicated that the assets in this account would have been available to pay the proffered wage in 2007. Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

As stated above, 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. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2007 was an uncharacteristically unprofitable year for the petitioner. Counsel submitted the petitioner's tax returns for the years 2004 through 2008. No information has been provided for the years 2001 through 2003. The submitted tax returns show that the petitioner's net income dropped significantly from 2005 to 2006, dropped again from 2006 to 2007, and increased moderately in 2008. In addition, the petitioner averaged gross receipts of less than $275,000 from 2006 to 2008. Thus, it cannot be said that 2007 was an uncharacteristically

unprofitable or difficult year for the petitioner within a framework of profitable or successful years. Further, it is noted that from 2004 to 2008 the petitioner paid an average of just over in total salaries and wages to all employees, which is less than the proffered wage for this one employee, and just over in officer compensation.

Counsel also argued that the petitioner has a reasonable expectation of profitability going forward. Specifically, counsel states that there is an "expectation of improvement in the economy and substantial government support of sustainable technologies." This statement is purely speculative. There is nothing in the record to show that an improvement in the general economy would improve the petitioner's financial position. Nor is there anything in the record to establish that the government's general "support" of sustainable technologies would directly benefit the petitioner. 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. 1971). Further, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 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.

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