



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
SRC 07 131 50037

Office: TEXAS SERVICE CENTER

Date: DEC 22 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a property manager and maintenance company. It seeks to employ the beneficiary permanently in the United States as a property manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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. Therefore, the director denied the petition.

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 November 12, 2007 denial, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, DOL accepted the Form ETA 750 on April 24, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$3,912.12 per month (\$46,945.56 per year). The Form ETA 750 states that the position requires eight years of grade school, four years of high school and four years of experience in the proffered position.

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 on appeal.²

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$400,000, and to currently employ 7 workers. According to the tax returns in the record, the petitioner’s fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner from February 2001 through the date that she signed that form. The petitioner also submitted copies of the Forms W-2, Wage and Tax Statement, which it issued to the beneficiary in 2001, 2002, 2003 and 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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

¹ USCIS records indicate that the petitioner also filed a Form ETA 750 for a different beneficiary on April 27, 2001. The related Form I-140, Immigrant Petition for Alien Worker, was approved on May 20, 2009. The related Form I-485, Application to Register Permanent Residence or Adjust Status, for the beneficiary in that matter is still pending as of the date of this decision.

² 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).

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 employed and paid the beneficiary the full proffered wage from the priority date of April 24, 2001 forward. The Forms W-2 in the record indicate that the petitioner paid the beneficiary \$4,000 in 2001, \$6,000 in 2002, \$6,000 in 2003 and \$8,400 in 2006. The Quarterly Wage and Withholding Reports for 2006 in the record also indicate that the petitioner paid the beneficiary \$8,400 in 2006. The petitioner is obligated to demonstrate that it can pay the difference between wages it actually paid to the beneficiary and the proffered wage in each year, which is \$42,945.56 in 2001, \$40,945.56 in 2002, \$40,945.56 in 2003 and \$38,545.56 in 2006.

The petitioner's owner also indicated that the petitioner paid the beneficiary \$8,400 each year from 2002 through 2005. This is not documented in the record. Going on record without supporting documentary evidence is not sufficient to meet 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)). Unsupported assertions are not evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). This office notes further that in the director's August 24, 2007 Request for Evidence the petitioner was directed to submit evidence of any wages it paid to the beneficiary during the relevant period such as Forms W-2.

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). 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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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). Thus, any suggestion made by the petitioner that depreciation should be considered funds available to pay the wage will not be considered.

For a C corporation, USCIS considers net income to be the figure shown on Line 24 of the Form 1120-A, U.S. Corporation Short Form Income Tax Return, or on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 10, 2007 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 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001-2005 as shown in the table below.

- In 2001, the Form 1120-A stated net income (loss) of -\$1,256.
- In 2002, the Form 1120-A stated net income (loss) of -\$2,406.
- In 2003, the Form 1120-A stated net income (loss) of -\$10,101.
- In 2004, the Form 1120 stated net income (loss) of \$2,295.
- In 2005, the Form 1120 stated net income (loss) of -\$12,906.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the difference between the full proffered wage and the amount which it actually paid the beneficiary in those years (or \$42,945.56 in 2001, \$40,945.56 in 2002 and \$40,945.56 in 2003.) The petitioner also did not have sufficient net income to pay the full proffered wage in 2004 and 2005.

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 assets. The petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the

determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on page 2, part III of the Form 1120-A, lines 1 through 6 and include cash-on-hand, and its year-end current liabilities are shown at lines 13 and 14 of part III. On the Form 1120, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and also include cash-on-hand, and its year-end current liabilities are shown on lines 16 through 18 of the Schedule L. 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 2001-2005, as shown in the table below.

- The 2001 Form 1120-A in the record does not list the petitioner's current assets and current liabilities.
- The 2002 Form 1120-A in the record does not list the petitioner's current assets and current liabilities.
- The 2003 Form 1120-A in the record does not list the petitioner's current assets and current liabilities.
- The 2004 Form 1120 in the record does not list the petitioner's current assets and current liabilities.
- The 2005 Form 1120 in the record reflects net current assets of \$19,209.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not establish that it had sufficient net current assets to pay the difference between the full proffered wage and the amount which it actually paid the beneficiary in those years (or \$42,945.56 in 2001, \$40,945.56 in 2002 and \$40,945.56 in 2003.) The petitioner also did not establish that it had sufficient net current assets to pay the full proffered wage of \$46,945.56 in 2004 and 2005.

Thus, for the years 2001-2005, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

³According 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.

On appeal, counsel asserted that the petitioner's sole shareholder is [REDACTED] withdrew compensation from the petitioner as an officer merely to minimize his tax burden, and that his compensation could be adjusted down in order to cover the proffered wage. The Forms 1120-A and 1120 in the record indicate that the petitioner paid out officers' compensation in 2001 of \$125,000; in 2002 of \$50,000; in 2003 of \$50,000; in 2004 of \$65,000; and in 2005 of \$120,000. Counsel submitted a copy of a document titled Stock Transfer Ledger which indicates that on May 12, 1999, [REDACTED] became co-owners of an unnamed entity and that certificates were issued to each of them for 5,000 shares in an unnamed entity. In the column next to [REDACTED] name and in the column next to the date that she became owner, the word "VOID" was entered in this stock transfer ledger on an unspecified date. In addition, counsel submitted a copy of a certificate that indicates that on May 12, 1999, [REDACTED] became the registered owner of 5,000 shares in the petitioner, which has authorized capital stock of 100,000 common shares. The record also includes copies of pages 4 and 5 of a document which counsel referred to in his brief as a minute book. Pages 4 and 5 indicate that the petitioner has two officers, [REDACTED] and that the petitioner had issued to [REDACTED] 5,000 shares of "its no par value common stock" in exchange for "the transfer to the corporation of all of those assets and liabilities set forth on Schedule A, which is attached hereto." Schedule A and the rest of this document was not submitted. Only pages 4 and 5 of the document are in the record. The AAO finds that the petitioner has not sufficiently documented that throughout the relevant period of April 24, 2001 through the date that the record closed in 2007, that it had only one shareholder and one officer: [REDACTED]. Going on record without sufficient supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

The August 15, 2006 letter of the petitioner's owner, [REDACTED] in the record indicates that Mr. [REDACTED] is willing to adjust his compensation down in order to cover the proffered wage. In addition, [REDACTED] submitted: his 2001 Form 1040, U.S. Individual Tax Return, which indicates at line 33 that his adjusted gross income for that year was \$59,235; his 2002 Form 1040 which indicates at line 35 that his adjusted gross income for that year was \$40,118; and his 2003 Form 1040 which indicates at line 35 that his adjusted gross income for that year was \$81, 183. However, there is no notarized, sworn statement in the record which attests to the specific amount of compensation that [REDACTED] received from the petitioner and the specific amount that he would be willing and able to forego to cover the beneficiary's wage in support of the suggestion that USCIS should consider such compensation as funds available to pay the proffered wage. Going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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 the August 15, 2006 letter, [REDACTED] also indicated that he earned sufficient funds as officer compensation from his several other companies to cover the proffered wage. However, 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. Further, the petitioner's owner did not document for the record that he earned officer compensation from several other companies throughout the relevant period of analysis that was sufficient to cover the proffered wage. Going on record without supporting documentary evidence is not sufficient to meet 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)).

On appeal, counsel indicated too that because the priority date in this matter is April 24, 2001, more than one-fourth of the way into the year 2001, the petitioner needs only to show an ability to pay three-fourths of the proffered wage in 2001. This office will not prorate the proffered wage such that the petitioner is only obliged to show an ability to pay a fraction of the proffered wage based on the fraction of the year which follows the April 24, 2001 priority date. That is, the AAO will not apply 12 months of net income towards an ability to pay a lesser period of the proffered wage, any more than it would apply 24 months of net income towards an ability to pay the annual proffered wage. USCIS will only prorate the proffered wage if the record contains evidence of the net income earned or the wages paid to the beneficiary by the petitioner during that specific portion of the year that occurred after the priority date, such as monthly income statements or pay stubs. In this instance, the petitioner has not submitted such evidence.

Further, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit, as suggested by counsel. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit were available at the time of filing the petition. 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. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. If the petitioner wishes to rely on a line of credit 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 line of credit 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 firm'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. Comm. 1977).

Any suggestion that the beneficiary received a rent credit during the period of analysis and that the cash value of such should be considered as funds available to pay the proffered wage is misplaced. The petitioner has not provided any documentation to support its assertions that the beneficiary received a rent credit in exchange for work done on behalf of the petitioner during the period of analysis or any documentation on the market value of rent at the petitioner's property. 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)).

Further, the record does not include evidence related to the other Form ETA 750 filed by the petitioner during April 2001, three days after the Form ETA 750 in the instant matter was filed, which led to an approved immigrant petition for a beneficiary who is currently attempting to adjust to lawful permanent resident status. Thus, the petitioner must show the ability to pay the proffered wage as defined in that other proceeding as an additional expense each year from 2001 through 2007 when this record closed, before USCIS may find that it had the ability to pay the instant wage in any year since 2001.

In the notice of decision, the director indicated that the petitioner had demonstrated an ability to pay the wage in 2004. Yet, the director was not made aware of the other Form ETA 750 filed by the petitioner during April 2001. Thus, the director was not aware of the petitioner's added expense in 2004 of the other beneficiary's salary. Also, the AAO can find no evidence in the record to support the director's finding that the petitioner had established an ability to pay the wage in 2004. Thus, this office withdraws this point in the notice of decision.

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 incorporated in 1999 and has 7 employees. It has not established its historical growth since incorporating. Its gross sales or receipts have not steadily increased, but have fluctuated as follows: \$275,193 in 2001; \$267,195 in 2002; \$203,748 in 2003; \$323,037 in 2004; and \$392,713 in 2005. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be 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 from the priority date onwards.

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.