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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JAN 14 2009

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IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 103(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).

John F. Grissom, Acting 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 a custom woodcraft business. It seeks to employ the beneficiary permanently in the United States as a master cabinet maker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 25, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation 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, the Form ETA 750 was accepted on February 14, 2003. The proffered wage as stated on the Form ETA 750 is \$18.40 per hour (\$38,272.00 per year). The Form ETA 750 states that the position requires two years 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 On appeal, counsel submits a brief; a letter dated August 18, 2008 from the petitioner; a chart and supporting documentation detailing additional benefits paid to the beneficiary by the petitioner; the beneficiary's IRS Forms W-2 for 2003, 2004, 2005, 2006 and 2007 issued by the petitioner; the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2007; the petitioner's shareholder's Arizona nonresident tax return for 2005; the petitioner's monthly bank statements from Bank of America for 2003 and 2005; the petitioner's monthly bank statements from Wells Fargo Bank for 2003 and 2005;² and evidence of the petitioner's and the petitioner's shareholder's lines of credit with Wells Fargo Bank. Other relevant evidence in the record includes the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2003, 2004, 2005, and 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 March 1998 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 10, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner had a total net income of \$81,282.00 in 2003 without a one-time machinery purchase and a total net income of \$63,810.00 in 2005 by averaging supply purchases and adding a non-cash deduction of depreciation and amortization of \$9,168.00. Counsel further asserts that the beneficiary was paid additional benefits of two weeks paid vacation, one week paid sick leave, \$200 monthly gas allowance and \$200 monthly health insurance. Counsel states that the petitioner paid the beneficiary wages in each relevant year and that combined with the petitioner's costs of outside labor, the petitioner has established its ability to pay the proffered wage in 2003 and 2005. Counsel asserts that the petitioner could have paid the beneficiary on a full-time basis and not utilized outside services. Counsel also asserts that the petitioner's net income combined with wages paid to the beneficiary in 2007 establish the petitioner's ability to pay the

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 The monthly statement for September 2003 was not included on appeal.

proffered wage that year. Counsel further asserts that the petitioner received \$126,993.00 in additional income on behalf of the State of Arizona and that those funds could have been utilized to pay the proffered wage. Counsel provides copies of the petitioner's monthly bank statements from Bank of America for 2003 and 2005 and the petitioner's monthly bank statements from Wells Fargo Bank for 2003 and 2005, and asserts that the petitioner had sufficient cash on hand to pay the proffered wage in 2003 and 2005. Counsel states that the petitioner's credit line and the petitioner's shareholder's line of credit establish the petitioner's ability to pay the proffered wage. Finally, counsel states that the totality of the circumstances affecting the petitioner's business should be considered in a determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although, as noted by counsel on appeal, 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).

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, on the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner. However, the beneficiary's IRS Forms W-2 for 2003, 2004, 2005, 2006 and 2007 show compensation received from the petitioner, as shown in the table below.

- In 2003, the Form W-2 stated compensation of \$19,629.26.
In 2004, the Form W-2 stated compensation of \$13,440.00.
- In 2005, the Form W-2 stated compensation of \$18,160.00.
- In 2006, the Form W-2 stated compensation of \$20,480.00.
- In 2007, the Form W-2 stated compensation of \$24,840.00.

Therefore, for the years 2003, 2004, 2005, 2006 and 2007, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$38,272.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage,

which is \$18,642.74, \$24,832.00, \$20,112.00, \$17,792.00 and \$13,432.00 in 2003, 2004, 2005, 2006 and 2007, 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. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537

The petitioner's tax returns demonstrate its net income for 2003, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2003, the Form 1120S stated net income³ of -\$7,008.00.

³ 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 23 (2003), line 17e (2004-2005) and line 18 (2006-2007) of Schedule K. See Instructions for Form

- In 2004, the Form 1120S stated net income of \$45,618.00.
- In 2005, the Form 1120S stated net income of -\$36,791.00.
- In 2006, the Form 1120S stated net income of \$82,624.00.
- In 2007, the Form 1120S stated net income of \$28,585.00.

Therefore, for the years 2004, 2006 and 2007, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.⁴ For the years 2003 and 2005, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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.⁵ A corporation's year-end current assets are shown

1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 8, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2003, 2004, 2005 and 2007, the petitioner's net income is found on Schedule K of its tax returns for those years. For 2006, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S.

⁴ USCIS electronic records show that the petitioner filed one other I-140 petition which has been pending during the time period relevant to the instant petition. 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 simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2). The other petition submitted by the petitioner in April 2007 was approved in April 2008. The record in the instant case contains no information about the proffered wage for the beneficiary of that petition, about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Furthermore, no information is provided about the current employment status of the beneficiary, the date of any hiring and any current wages of the beneficiary. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certification application.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 2003 and 2005, as shown in the table below.

- In 2003, the Form 1120S did not list any net current assets.⁶
- In 2005, the Form 1120S stated net current assets of -\$91,700.00.

Therefore, for the years 2003 and 2005, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that the beneficiary was paid additional benefits of two weeks paid vacation, one week paid sick leave, \$200 monthly gas allowance and \$200 monthly health insurance. The record does not indicate if the vacation and sick leave benefits are included in the beneficiary's Forms W-2 as wages paid. Further, the record does not indicate if the benefits are standard among the petitioner's part-time employees.⁷ 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)). Regardless, even if we

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.

⁶ Because the petitioner answered "yes" to question 9 of Schedule B to its Form 1120S, it was not required to complete Schedule L in 2003. However, the petitioner provided no other evidence of its net current assets for 2003. 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)).

⁷ We note that the Blue Cross of California statement submitted by the petitioner on appeal does not indicate the date the petitioner paid \$214.00 for health insurance coverage on behalf of the beneficiary. Therefore, the petitioner has not established that it paid \$214.00 per year in 2003 and 2005 for health insurance coverage on behalf of the beneficiary. Further, the petitioner submits a statement dated July 19, 2008 from Chevron and Texaco Business Cards to support its assertion that the beneficiary had a gas allowance of \$200 per month in 2003 and 2005. The record contains no evidence of gas payments made on the beneficiary's behalf in 2003 or 2005.

combine the total value of benefits paid to the beneficiary of \$1,504.00 per year and the Form W-2 wages paid to the beneficiary in 2003 and 2005, the petitioner has not established that it had sufficient net income or net current assets to pay the difference between the wages actually paid to the beneficiary (including benefits) and the proffered wage.⁸

On appeal, counsel states that the petitioner paid the beneficiary wages in each relevant year and that combined with the petitioner's costs of outside labor, the petitioner has established its ability to pay the proffered wage in 2003 and 2005. Counsel asserts that the petitioner could have paid the beneficiary on a full-time basis and not utilized outside services. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not named the other workers or stated their wages, and the record does not verify their full-time employment. Moreover, there is no evidence that the positions of the other workers involve the same duties as those set forth in the Form ETA 750. If the employees perform other kinds of work, then the beneficiary could not replace them. Finally, pursuant to the petitioner's 2003 federal income tax return, the petitioner paid total wages and costs of labor of \$37,813.00 in 2003, including payments made to the beneficiary. The proffered wage is \$38,272.00. Thus, the petitioner could not have paid the proffered wage by combining wages paid to the beneficiary and wages paid to other workers in 2003. In sum, the wages paid to the other workers may not be utilized to prove the petitioner's ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

On appeal, counsel provides copies of the petitioner's monthly bank statements from Bank of America for 2003 and 2005 and the petitioner's monthly bank statements from Wells Fargo Bank for 2003 and 2005, and asserts that the petitioner had sufficient cash on hand to pay the proffered wage in 2003 and 2005. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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.

On appeal, counsel states that the petitioner's \$59,000.00 credit line and the petitioner's shareholder's \$250,000.00 line of credit establish the petitioner's ability to pay the proffered wage. 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. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular

⁸ We also note that the labor certification application does not indicate that the job offer would include benefits other than what is normally provided to employees.

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 petitioner's 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 are available at the time of filing the petition.⁹ 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 or audited financial statement 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. However, 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).

Further, the petitioner's shareholder's \$250,000.00 line of credit does not establish the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel further asserts on appeal that the petitioner received \$126,993.00 in additional income on behalf of the State of Arizona and that those funds could have been utilized to pay the proffered wage. In support of this assertion, counsel submits the petitioner's shareholder's Arizona nonresident personal income tax return for 2005. The \$126,993.00 in income was reported on the petitioner's shareholder's personal income tax return, and not on the petitioner's tax return. Therefore, as set forth above, this income cannot be considered in determining the petitioning corporation's ability to pay the proffered wage in 2005. *See Id.*

Finally, on appeal, counsel states that the totality of the circumstances affecting the petitioner's business should be considered in a determination of the petitioner's ability to pay the proffered wage.

⁹ We note that the statement from Wells Fargo bank evidencing the petitioner's credit line of \$59,000.00 was printed in 2008, while the petitioner filed the petition in March 2007.

See Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967). 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 Id.* 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.

The petitioner has been doing business since 1998. It had gross receipts of \$216,172.00, \$339,336.00, \$252,274.00, \$426,533.00, and \$480,622.00 in 2003, 2004, 2005, 2006 and 2007, respectively. The petitioner's decline in gross receipts in 2005 has not been explained. The petitioner claimed three employees on the Form I-140 petition. It paid \$0, \$1,800.00, \$5,400.00, \$2,400.00 and \$64,550.00 in 2003, 2004, 2005, 2006 and 2007, respectively, and paid costs of labor of \$37,813.00, \$25,560.00, \$41,024.00, \$57,180.00, and \$0 in 2003, 2004, 2005, 2006 and 2007, respectively. In 2003, counsel asserts on appeal that the petitioner made a one-time machinery purchase of \$88,250.00. However, the petitioner does not indicate the type of machinery purchased, does not provide invoices for the machinery and does not detail why the purchase was uncharacteristic. 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 petitioner claims that it had an extremely high purchase of supplies in 2005 in the amount of \$100,521.00. However, the petitioner does not indicate the type of supplies purchased, does not provide invoices for the supplies and does not detail why the purchases were uncharacteristic. The petitioner has not established its reputation within its industry. 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.

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 Form ETA 750 was accepted for processing by the DOL.

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.