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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services

B6

FILE: [REDACTED]  
EAC 04 166 52514

Office: TEXAS SERVICE CENTER Date:

MAY 19 2009

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

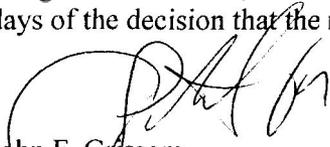
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grossom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center (director) revoked the approval of the employment-based preference visa petition based on the petitioner's failure to establish that it has a need for a foreign food specialty cook or that it qualifies as a restaurant requiring such a position. The petitioner appealed to the Administrative Appeals Office ("AAO"), and overcame the above grounds for revocation. However, the AAO found that the petitioner had not established its continuing ability to pay the proffered wage from the priority date of the labor certification, December 19, 2002. The AAO remanded the petition to the director to issue a request for evidence (RFE) related to the new basis for revocation, and then for the director to render a determination on the merits of the petition. The director issued an Notice of Intent to Deny. The petitioner provided a response and new evidence. The director stated that the petitioner had not overcome the ground for denial and certified his decision to the AAO for review. The director's decision on remand will be upheld; the appeal will be dismissed; the director's decision will be affirmed, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director, on remand, determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date and denied the petition accordingly.

On certification, counsel for the petitioner requests that a decision be made based upon the record presented.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

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 or seasonal nature, for which qualified workers are not available in the United States.

On November 26, 2008, after the visa petition was remanded to the director for further consideration and entry of a new decision, the director issued a notice of intent to deny (NOID) and requested additional evidence of the petitioner's continuing ability to pay the proffered wage from the priority date of the visa petition. The director specifically requested:

The documents submitted do not clearly establish the petitioner's ability to pay this beneficiary. The Labor Certification establishes the beneficiary will be paid \$12.00 per hour for a 40-hour workweek. This totals a year salary (2080 hours) of \$24,960. Evidence submitted with the I-140 petition (1120S for the year 2003) indicates your ability to pay this prospective employee for that year (petitioner net income of \$28,472). However, you also obtained a labor certification and filed another I-140 petition for a meat cutter who is to be paid \$13.71 an hour for a 40-hour workweek, a total of \$28,516.80 yearly. Both labor certifications were filed on the same date and have the same priority date: December 19, 2002.

Please submit evidence to establish the petitioner's ability to pay the proffered wages for both beneficiaries for the years 2003, 2004, 2005, 2006, and 2007. Any evidence submitted must clearly establish the petitioner's ability to pay both prospective employees; i.e., a yearly net income in excess of \$53,476.80.

Such evidence must be in the form of annual reports, U.S. federal tax returns, or audited financial statements. You may also include additional evidence, such as profit/loss statements, bank account records, and personnel records.

As sole proprietor of the petitioning company, you may use personal assets to pay the wage(s). If you will use personal assets to pay the wage(s), evidence must be submitted to verify that you are in possession of sufficient assets to pay the proffered

wage(s). Examples of personal assets are bank statements, checking account statements, stock account statements, etc.

Submit copies of your Internal Revenue Service (IRS) Form 1040 (U.S. Individual Income Tax Return) and supplementary Schedule C for 2003, 2004, 2005, 2006, and 2007.

In addition, please submit a statement of monthly expenses for your family. This statement must indicate all of the family's household living expenses. Such items should include (but are not limited to) the following: housing (rent or mortgage), food, care payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. All items may be subject to verification.

The petitioner was afforded thirty days to submit the requested evidence. In response, counsel submitted a brief, copies of the petitioner's 2003 through 2007 Forms 1120S, U.S. Income Tax Returns for an S Corporation, an affidavit, dated November 24, 2008 from the petitioner's owner, and copies of the 2006 and 2007 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of [REDACTED]. The director determined that the petitioner had not established its continuing ability to pay the proffered wage to the beneficiary and the additional beneficiary from the priority date of December 19, 2002, and on March 23, 2009, the director denied the visa petition and certified his decision to the AAO.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is December 19, 2002. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour or \$24,960 annually.

The petitioner's 2003 through 2007 Forms 1120S reflect ordinary incomes or net incomes of \$28,472, \$30,126, \$27,201, \$31,337, and \$28,302, respectively. The petitioner's 2003 through 2007 Forms 1120S also reflect net current assets of \$0, no schedule L, \$6,069, \$8,848, and \$6,218, respectively.

The 2006 and 2007 Forms W-2 for [REDACTED] reflect wages paid to [REDACTED] by the petitioner of \$29,120 in 2006 and \$24,640 in 2007.

The affidavit from the petitioner's owner states:

- 1) I am the only officer and shareholder of [the petitioner].
- 2) The "compensation of officers" listed on Line 7 of Form 1120S for [the petitioner] is available to pay the wages to support the application for alien employment certification because I have other business interests which cover my personal expenses.
- 3) In addition, I own real estate.
- 4) From 2003-2005 I was the sole employee of the business because I could not find a qualified worker and neither [the beneficiary] nor [REDACTED] had an employment authorization card.
- 5) In 2006, [REDACTED] began working in the business and received wages in 2006 and 2007.
- 6) I also own a gas station and convenience store with my wife, [REDACTED]. This business is located at [REDACTED]. The income we receive from this business is sufficient to cover our personal living expenses.
- 7) As requested, you will find below our monthly recurring personal expenses:

Rent/Mortgage	\$985.00
Car Payment	\$300.00
Electric	\$ 30.00
Telephone	\$ 49.00
Auto Insurance	\$270.00
Cable	\$ 33.00
Food	\$300.00
Total	\$1967

In response to the NOID, counsel states:

The instant petition is for a cook with a salary of \$12.00 per hour or \$24,960 annually. The second petition is for a halal butcher with a salary of \$13.71 per hour or \$28,516.80 annually. (The beneficiary of this application is [REDACTED]. The evidence therefore must clearly establish the ability to pay the combined wages of \$53,476.80. The priority date for the applications is December 19, 2002.

\* \* \*

Because Petitioner is a Subchapter S Corporation, we respectfully submit that the compensation of officers and wages paid to the officers may be considered as available funds to pay the prevailing wage rate. In accordance with *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the income tax returns can be supplemented by other evidence. This makes sense given the fact that tax returns are designed to allow a corporation to reduce its taxable income thus permitting a shareholder in a Subchapter S corporation to structure payments in a way which would be most advantageous for him on his personal tax returns. The Notice of Intent to Deny also acknowledges that the owner of the Petitioner may use evidence of personal income/assets to satisfy the wage obligation.

In the instant case, the only shareholder and officer of the petitioner is [REDACTED] and he receives compensation of \$15,600. Attached as Exhibit B is an Affidavit from [REDACTED] indicating that he is able and willing to forego both the compensation he received as officer of the corporation and any salary paid to him. [REDACTED] has listed his reoccurring personal monthly expenses as requested.

\* \* \*

In 2003, the petitioning entity had net income of \$28,472.00 and officer's compensation of \$15,600 for a total of \$44,072. [REDACTED] had additionally personal funds available to cover the shortage. See Exhibit C.

In 2004 and 2005, the cumulative required wages were available based upon the net income as reported on line 21 of Form 1040S [sic] and the compensation of officers, line 7, and wages paid to self, line 8.

In 2006, [REDACTED], the beneficiary of the second Application for Alien Employment Certification received his employment authorization card. In 2006, wages were paid to this beneficiary totaling \$29,120 and in 2007, wages were paid to [REDACTED] in the amount of \$24,640.00. See Exhibit D which contains the 2006 and 2007 W-2 Form issued to [REDACTED]. Therefore, in 2006 and 2007, the cumulative required wages were available based upon the stated net income on line 21 of the Form 1120S plus the wages paid to the beneficiary, [REDACTED]

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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, signed by the beneficiary on December 18, 2002, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, as proof of the beneficiary's employment with the petitioner. Therefore, the petitioner has not established that it employed the beneficiary in 2003 through 2007, and it is obligated to show that it had sufficient funds to pay the entire proffered wage of \$24,960 in those years. In addition, USCIS records indicate that the petitioner filed another Form I-140 on behalf of another beneficiary with the same priority date of December 19, 2002 and a wage of \$28,516.80 annually. Therefore, the petitioner is obligated to show that it had sufficient funds to pay both wages in the pertinent years, or \$53,476.80.<sup>1</sup>

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as 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 federal case law. *See 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense

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<sup>1</sup> Evidence in the record of proceeding (Forms W-2) reflects wages paid to the second beneficiary of \$29,120 in 2006 and \$24,640 in 2007. Since the petitioner paid the second beneficiary more than his proffered wage of \$28,516.80, the petitioner is only obligated to show that it had sufficient funds to pay the instant beneficiary the proffered wage of \$24,960 in 2006. However, in 2007, the petitioner paid the second beneficiary \$24,640 or \$3,876.80 less than his proffered wage of \$28,516.80, and the petitioner is obligated to show that it had sufficient funds to pay the instant beneficiary the proffered wage of \$24,960 and the remaining proffered wage of \$3,876.80 to the second beneficiary, or \$28,836.80 in 2007.

charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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*, 719 F. Supp. at 537.

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 (1997-2003) or line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional 2003 and 2005 through 2007 income and deductions shown on its Schedule K, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S. The petitioner failed to provide its Schedule K for 2004, therefore, it is not possible for the AAO to determine whether or not the petitioner had additional income and deductions shown on its Schedule K for 2004. Therefore, the AAO will consider the petitioner's net income to be the figure found on line 21 of page one of the petitioner's IRS Form 1120S for 2004.

In the instant case, the petitioner's net incomes for 2003 through 2007 were \$28,472, \$30,126, \$27,201, \$31,337 and \$28,302, respectively. The petitioner could not have paid the proffered wage of \$24,960 to the instant beneficiary and the proffered wage of \$28,516.80 (\$53,476.80 total) to the second beneficiary from its net incomes in 2003 through 2005. The petitioner could have paid the proffered wage of \$24,960 to the instant beneficiary in 2006 from its net income in 2006. (The petitioner need only pay the proffered wage of the instant beneficiary as it paid the second beneficiary more than his proffered wage in 2006.) The petitioner could not have paid the proffered wage of \$24,960 to the instant beneficiary and the remaining proffered wage of \$3,876.80 to the second beneficiary (\$28,836.80 total) from its net income in 2007. Therefore, the petitioner has established its ability to pay the proffered wage in 2006, but not in 2003 through 2005 and 2007 from its net incomes.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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 include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2003, 2005, and 2007 net current assets were \$0, \$6,069, and \$6,218, respectively.<sup>3</sup> The petitioner could not have paid the proffered wage of \$24,960 to the instant beneficiary and the proffered wage of \$28,516.80 (\$53,476.80 total) to the second beneficiary from its net current assets in 2003 and 2005. In addition, the petitioner could not have paid the proffered wage of \$24,960 to the instant beneficiary and the remaining proffered wage of \$3,876.80 to the second beneficiary (\$28,836.80 total) from its net current assets in 2007.

In response to the director's NOID, counsel claims that the petitioner has established its ability to pay the proffered wages to the two beneficiaries based on the petitioner's net incomes, officer's compensation, and the owner's personal assets.

Counsel is mistaken. It should be noted from the outset that the director erred in stating that the petitioner could use the owner's personal assets to establish its ability to pay the proffered wages. 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the AAO will not consider the owner's personal assets when determining the petitioner's ability to pay the proffered wage.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>3</sup> The petitioner failed to submit its Schedule L for 2004, and, therefore, the AAO cannot determine if the petitioner had sufficient funds to pay the proffered wage to the instant beneficiary and the second beneficiary from its net current assets in 2004. The petitioner has already established its ability to pay the proffered wage in 2006 from its net income.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's IRS Forms 1120S, [REDACTED] elected to pay himself \$15,600 in 2003 through 2007. These figures are not supported by any W-2 Forms. We note here that the compensation received by the company's owner during 2003 through 2007 was a fixed salary and not a flexible amount based on the profitability of the corporation. In addition, although the owner states that he has other business interests which could cover his personal expenses, the petitioner has provided no evidence to support this claim. Instead, the fixed amount of the compensation of officers would indicate that it is a set salary, and wages already paid to others cannot be used to establish the petitioner's ability to pay the proffered wages in the pertinent years. Again, USCIS has long held that it 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.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner's tax returns indicate it was incorporated on August 14, 2000. The petitioner has provided its tax returns for 2003 through 2007, with only the 2006 tax return establishing the petitioner's ability to pay the proffered wage of \$24,960. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. The tax returns do not show significant wages paid to other workers. The petitioner's 2003 return shows no wages paid to other workers; the 2004 and 2005 returns show only minimal wages paid. Furthermore, the petitioner has filed an additional immigrant petition with the same priority date. Therefore, the petitioner must establish that it had sufficient funds to pay both wages from the priority date and continuing to the present. 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 record does not resolve the petitioner's need to demonstrate an ability to pay the proffered wage for the beneficiary in this matter in addition to paying the second beneficiary represented by the other immigrant petition filed by the petitioner. 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.

For the reasons discussed above, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The director's decision of March 23, 2009 is affirmed, and the petition is denied.