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FILE: [REDACTED]
LIN 07 015 53181

Office: NEBRASKA SERVICE CENTER

Date:
NOV 17 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:

[REDACTED]

INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a window supply company. It seeks to employ the beneficiary permanently in the United States as a window repairer supervisor, earning Union wages. 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 January 23, 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. The AAO has identified a second issue, namely, what company is the actual petitioner and whether there is a successor-in-interest issue.

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, the Form ETA 750 was accepted on February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$33.94 per hour (\$70,595.20 per year). The Form ETA 750 states that the position requires two years of prior work 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 upon appeal.¹

On appeal, counsel submits the petitioner's owner's Form 1040, U.S. Individual Income Tax Return, for 2001 that indicates he had adjusted gross income of \$533,091 in that year. Counsel also submits a copy of the petitioner's Schedule K for tax year 2006 that shows [REDACTED] is the petitioner's sole shareholder, and that his ordinary business income for 2006 was -\$159,521.

Relevant evidence in the record also includes the petitioner's Forms 1120, for tax years 2001, 2002, and 2003 and Forms 1120S, U.S. Corporate Tax Returns for an S Corporation for tax years 2004, 2005, 2006, and 2007. The tax returns identify the petitioner's address as [REDACTED] while the I-140 petition and the ETA 750 filed in 2001 identify the petitioner's address as [REDACTED]. Both the I-140 petition and the tax returns o the record contain the same Employer Identification Number (EIN), namely, [REDACTED].

The evidence in the record of proceeding shows that the petitioner, located at [REDACTED] is structured as a C corporation in tax years 2001 to 2003 and as an S corporation in tax years 2004 to 2006. On the petition, the petitioner claimed to have been established in March 24, 1994, and does not indicate its gross or net annual income or the number of workers it currently employs. According to the tax returns in the record, the petitioner's fiscal year is the calendar year.

The record of proceedings contains three signed Forms ETA 750B. Two of the signed documents are identical. The beneficiary signed these two documents on September 15, 2006 and lists the petitioner, located at [REDACTED] as the prospective employer. On both documents, the beneficiary claimed he worked for [REDACTED], from April 1998 to the date he signed the Form ETA 750B. The third Form ETA 750B found in the record is a copy of an original document that identifies the prospective employer as [REDACTED]. The beneficiary signed this document on May 9, 2006. The beneficiary indicates that he worked for [REDACTED] from April 1998 to 2003.

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).

The beneficiary did not claim to have worked for the petitioner. It is unclear whether this is a draft document or whether it is actually submitted to DOL.

On August 26, 2009, the AAO issued an RFE to the petitioner to resolve inconsistencies in the record of proceedings. With regard to the other business entities identified in the record, in particular on the ETA Forms 750, Part B,² the AAO questioned whether the petitioner had sufficiently demonstrated that it is the actual petitioner that filed the instant Form ETA 750 in 2001, or was the successor-in-interest to a predecessor company.³ The AAO also noted that the petitioner's tax return in 2001 reflected no business gross receipts to indicate that the petitioner conducted any business during the priority date year.

The AAO also noted that the New York state corporate database identifies [REDACTED] and [REDACTED] Brooklyn, New York, as being inactive as of December 31, 2003, with [REDACTED] listed as [REDACTED] of both businesses. However, a company also called Stealth Architectural Windows, with no address identified, remains in active status. See http://appsex8.dos.state.ny.us/corp_public/CORPSEARCHSELECT_ENTITY (Available as of October 25, 2009.) Window Works apparently was not conducting business as of the 2006 filing of the instant petition. The AAO requested that the petitioner explain the actual relationship between Window Works and Stealth Architectural Windows in tax years 2001 and 2002, and to further clarify the change in address for the petitioner.

In response, the petitioner submitted a letter dated September 17, 2009 from [REDACTED] the president of Stealth Architectural Windows. [REDACTED] stated that Window Works of Brooklyn was a company that he previously owned and operated in the state of New York, and that the company ceased operations in 2001-2002. [REDACTED] further stated that Stealth Architectural Windows, a corporation located at [REDACTED] with a shipping address of [REDACTED] has been

² The record contains sufficient evidence of the beneficiary's qualifications and the requisite two years of prior work experience without examining his employment with Window Works. However, the identical addresses on the Forms ETA Forms 750 for both Window Works and the petitioner raise questions as to whether the petitioner has done or is doing business as Window Works, or is a successor-in-interest to Window Works.

³ Successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

operating and is the successor in interest in the instant matter. [REDACTED] also stated that Stealth Architectural Window as a new petitioner assumed all of the rights, duties and obligations of the previous petitioner. [REDACTED] provides an additional letter with regard to the two addresses that states the shipping address was set up at the request of the Post Office. He also provided a plot plan for the [REDACTED] and [REDACTED] streets block with identification of various tax lots. The AAO finds the petitioner's evidence to be sufficient to establish that the petitioner has both a street address and a shipping address.

With regard to the AAO enquiry with regard to any successor in interest status between Window Works and Stealth Architectural Windows, the AAO notes that both counsel and [REDACTED] assert that the instant petitioner is the successor-in-interest to Window Works. However, the assertions of the petitioner or counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no further documentation such as a transfer of assets or other similar documents that would establish that the instant petitioner has assumed all the rights, and responsibilities of Window Works. As noted in the AAO's RFE, a successor in interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company.

Further to meet the ability to pay the proffered wage as a successor-in-interest, the petitioner would have to establish that the predecessor company had the ability to pay the proffered wage on the basis of its tax returns, or wages paid to the beneficiary as of the 2001 priority date and to the date the instant petitioner established the claimed successor in interest status. Rather, the evidence in the record reflects that Window Works and the petitioner that filed the I-140 petition and received the certified ETA Form 750 are two distinct businesses owned and/or operated by the same owner with varying levels of operations in the 2001 to 2002 period of time. For purposes of these proceedings, the AAO will consider the petitioner that filed the I-140 petition and is identified on the cover letter of the certified ETA Form 750 to be the actual petitioner. Thus, only the tax returns for Stealth Architectural Windows will be considered in these proceedings.

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).

Counsel in the petitioner's response also stated that USCIS may consider evidence relevant to the petitioner's financial ability that goes beyond the petitioner's net income and net current assets. Counsel references two unpublished AAO decisions in suggesting that the petitioner's depreciation

add back expenses, and the petitioner's bank statements may be utilized to establish the petitioner's ability to pay the proffered wage. With regard to counsel's reference to unpublished AAO decisions, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also states that if the petitioner's net income added to the wages paid to the beneficiary during the period is equal to or greater than the proffered wage, USCIS could approve the petition. Counsel submits W-2 Wage and Tax Statement Forms for the beneficiary for tax years 2000, 2001 and 2002. The 2001 W-2 Form indicates that Window Works of Brooklyn, Inc, (EIN [REDACTED]) paid the beneficiary \$29,583.60; while the two W-2 Forms for 2002 indicated that Window Works of Brooklyn, Inc, located in Dallas, Texas, and Stealth Windows, Inc. (EIN [REDACTED]) also located in Dallas, Texas, paid the beneficiary \$12,011.60 and \$16,829.21 respectively.

Counsel also submits [REDACTED] Forms 1040 for tax years 2001 and 2002. On accompanying Schedules E, the tax returns indicate [REDACTED] reported income or loss from and from one partnership and one S corporation in 2001 and one partnership and two S Corporations in 2002.⁴ Counsel also submits the 2007 tax return for Stealth Architectural Windows, Inc. that indicates ordinary net income of -\$44,249 and net current assets of \$153,841.

On appeal, counsel asserts that [REDACTED] as the petitioner's sole shareholder is free to use his personal income in his business matters. Counsel notes that the August 1998 issue of the *CPA Journal* states that an S Corporation passes the profit and losses directly to the shareholders who pay taxes and apply them against other income while filing their personal returns. Counsel states that United States Citizenship and Immigration Service (USCIS) should not consider only the initial evidence involving the petitioner's tax returns, but also the sole shareholder's personal financial capability in addition to the petitioner's ability to pay the proffered wage.

Counsel states that the petitioner's ability to pay the proffered wage should not be based solely on the petitioner's tax returns. Counsel refers to the petitioner's sole shareholder's adjusted gross income in tax year 2001 and 2002 and states that the sole shareholder's personal financial capability should also be examined to determine the petitioner's ability to pay the proffered wage. Counsel's assertions are not viewed as persuasive. First, the AAO notes that counsel's reference to utilizing the sole shareholder's assets is made within the context of an S corporation. However, in tax years 2001 to 2003, the petitioner was not a S corporation. More importantly and contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage with a C corporation. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and

⁴ The Schedule E partnership was identified as Avant Guards Property on both returns, and the S corporations were identified as The Glass House, in 2001; and the Glass House and Avant Guards Manufacturing, in 2002. With regard to adjusted gross income, [REDACTED]'s Forms 1040 indicated adjusted gross income of \$533,091 in 2001 and \$35,577 in 2002.

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. The AAO would also note that the petitioner's Form 1120 for 2001 does not identify [REDACTED] as an officer, or sole shareholder

In determining Stealth Architectural Windows' 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 its response to the AAO RFE, the I-140 petitioner submitted copies of the beneficiary's W-2 Forms from tax years 2001 and 2002 issued by Window Works of Brooklyn, Inc. (EIN [REDACTED]) and Stealth Windows, Inc. (EIN [REDACTED]). However, these documents were issued by businesses distinct from the petitioner as established by their Employer Identification Numbers (EIN).⁵ Therefore the AAO will not consider these documents as establishing wages paid by the instant petitioner to the beneficiary. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Thus the petitioner has to establish its ability to pay the entire proffered wage from 2001 onward based on the petitioner's net income or net current assets.

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, contrary to counsel's assertion, 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 insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

⁵ The petitioner's EIN is [REDACTED]

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 16, 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 2007 federal income tax return was not yet due. Since counsel submitted the petitioner’s 2007 tax return to the record in response to the AAO’s RFE, the AAO will also examine this document. The petitioner’s tax returns demonstrate its net income for tax years 2001 to 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$0.
- In 2002, the Form 1120 stated net income of -\$73.
- In 2003, the Form 1120 stated net income of -\$4,013.
- In 2004, the Form 1120S stated net income⁶ of \$34,211.

⁶ 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), line 17e (2004-2005) and line 18 (2006) of Schedule K. The AAO notes that only in tax year 2004 did the petitioner in the instant petition have an additional deduction that reduced the

- In 2005, the Form 1120S does not contain Schedule K. Therefore the AAO cannot determine whether the petitioner's net income is based on line 21 of the Form 1120S, or Schedule K. Line 21 indicates a net income of -\$77,146.
- In 2006, the Form 1120S stated net income of -\$159,521.
- In 2007, the Form 1120S the Form 1120S does not contain Schedule K. Therefore the AAO cannot determine whether the petitioner's net income is based on line 21 of the Form 1120S, or Schedule K. Line 21 indicates a net income of -\$44,249.

Therefore, for the years 2001 to 2007, the petitioner did not have sufficient net income to pay the 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 tax years 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$2,500.
- In 2002, the Form 1120 stated net current assets of \$5,027.
- In 2003, the Form 1120 stated net current assets of \$106,331.
- In 2004, the Form 1120S stated net current assets of \$362,264.

petitioner's actual net income in that year. In tax years 2005 and 2007, the petitioner did not submit Schedule K to the record. Thus, in these tax years the AAO cannot determine whether the petitioner's net income is based on line 21, Form 1120S, or Schedule K. In tax year 2006, the petitioner's net income is found on line 21, of the Form 1120S.

⁷According 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.

- In 2005, the Form 1120S stated net current assets of \$380,889.
- In 2006, the Form 1120S stated net current assets of \$234,613.
- In 2007, the Form 1120S stated net current assets of \$153,841.

For the years 2003 to 2007 the petitioner did have sufficient net current assets to pay the proffered wage. However, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the ability in the priority date year 2001 and in 2002 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'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. As previously discussed, the petitioner's sole shareholder's adjusted gross income for tax year 2001 or 2002, or the petitioner's depreciation line items cannot be utilized to establish the petitioner's ability to pay the proffered wage. Counsel also referred to the petitioner's bank statements in the response to the AAO's RFE, but the record contains no copies of any bank statements. Further, 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. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 will be considered below in determining the petitioner's net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the

petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not identified its gross or annual net income, or the number of workers it employs. The petitioner's tax return in 2001 reflects no business gross receipts which indicates the petitioner conducted any business during the priority date year. The petitioner in 2002 exhibits business activities generating gross receipts of \$597,352, with business operations during that year. The petitioner identified no compensation of officers or salaries and wages in tax year 2001; it identified no officer compensation for tax year 2002, but did indicate employment expenses of \$125,000.

In 2003, the petitioner did not pay any officer compensation but Statement 6 of the return indicates that Other Costs listed on Schedule A, includes management fees and employment expenses of \$400,000. In tax year 2004, the petitioner paid no officer compensation but indicates at Statement 4, Schedule A, Other Costs, that it paid management fees and employment expenses of \$747,554. In tax year 2005 the petitioner did not submit a Schedule A or any explanation of what was included in the category, other costs. In tax year 2006, there are decreasing gross profits, no wages or officer compensation noted on the first page of the return, or cost of labor noted on Schedule A. The petitioner indicated on Schedule A, Other Costs, a sum of \$100,214 that, as explained in Statement Four of the tax return, does not include any management fees or employment expenses. While the petitioner has established its ability to pay the proffered wage in tax years 2003 to 2007, the record is not clear as to the petitioner's long-term viability.

The record contains no further documentation on factors, such as the reputation or profile of the petitioner in the window replacement industry, or any circumstances that would have affected the petitioner's business operations in tax years 2001 and 2002. 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 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.