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

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FILE:

SRC 07 086 51625

Office: TEXAS SERVICE CENTER

Date: OCT 14 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a home healthcare company. It seeks to employ the beneficiary permanently in the United States as a physical therapist, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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 record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original denial of August 16, 2007, the single issue in this case is whether or not the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a physical therapist on January 27, 2007. Aliens who will be permanently employed as physical therapists are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."¹ The priority date of any petition

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). Thus, the priority date for the instant petition is January 27, 2007.

Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- 2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer’s employees as prescribed in § 656.10(d).

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 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 [United States Citizenship and Immigration Services (USCIS)].

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The proffered wage as stated on the Form ETA 750 is \$24 an hour, or \$49,920 annually.

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.²

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

Relevant evidence in the record includes the petitioner's Form 1120, U.S. Corporation Tax Return, for tax year 2006 submitted with the I-140 petition. The return indicates the petitioner has net income of -\$1,424 and net current assets of -\$70,033. The petitioner also submitted a document on letterhead dated December 29, 2006 entitled "Offer of Permanent Employment" that states the "facility" will sponsor the beneficiary for permanent residency, based on the beneficiary having secured her unrestricted license to practice physical therapy in the State of Michigan, and that the beneficiary would undergo a six-month probationary period. The document states that the starting salary for the position upon licensure is \$24.00 an hour, and that the agreement shall be valid for three years from the date of commencement of employment.

The petitioner in response to the director's RFE dated July 6, 2007 submitted the following evidence:

A list of deposits and distributions to and from the petitioner's Chemical Bank account for August 1, 2006 to July 16, 2007;

Employer's Quarterly State Report of Wages Paid to Each Employee that indicates in the second quarter of 2007, the petitioner paid wages to 38 individuals;

EasyPay documents that indicate the petitioner's Quarterly Tax Summary for quarter ending June 30, 2007, along with quarterly taxable wages for the petitioner's employees. This latter EasyPay document lists 61 employees, all of whom did not work during the second quarter.

Former counsel also noted that the petitioner's tax year begins on August 1, 2005 and ends on July 31, 2006.

On appeal, counsel submits the following evidence:

An affidavit from [REDACTED], the petitioner's officer dated August 31, 2007 accompanied by a letter. [REDACTED] states that the petitioner has been in existence for thirteen years and for several years, has generated over a million dollars of revenue. She also notes the petitioner's line of credit. [REDACTED] then states that the petitioner bills its customers \$60 an hour while paying its physical therapists no more than \$26 an hour, leaving the petitioner a net income of \$34 an hour. [REDACTED] states that the beneficiary will generate the income necessary to pay the proffered wage, referring to the invoices and invoice summary for another physical therapist for tax year 2006 submitted to the record that shows the physical therapist employee generated \$158,423.52 in 2006 for the petitioner. [REDACTED] also notes that the petitioner is a Medicare certified agency receiving its revenue mostly from the federally funded Medicare program. In reference to the CMS

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).

excerpt submitted to the record, [REDACTED] states that Medicare will pay higher reimbursements to the petitioner for its services and thus the beneficiary would generate more revenue for the petitioner. [REDACTED] concludes by stating the petitioner provides critical services in rural, underserved areas where there is a severe shortage of health care professionals. She states that the approval of the instant petition is in the best health interests of the people of the state of Michigan and the United States;

Two Forms 1099-MISC for tax year 2006 that indicate the petitioner received \$123,492.87 from Blue Cross Blue Shield of Michigan in medical and healthcare payments and \$1,061,544.63 from United Government Services, L.L. C , Milwaukee, Wisconsin for medical/healthcare payments;³

A Form 1099-MISC for tax year 2004 that indicates the petitioner, located at [REDACTED] [REDACTED] received \$1,103,119.94 from United Government Services, L.L.C., in tax year 2004;

A copy of Form 1065, U.S. Return of Partnership Income, for tax year 2006. The business filing the tax return is identified as Concerned Home Care Outsourcing, L.L. C., at the same address as the petitioner. The EIN on this return is [REDACTED]. The return indicates this business was established on August 1, 2006, and primarily outsources physical therapists;

A letter dated August 28, 2007, written by [REDACTED] Chemical Bank, that states the petitioner has an available line of credit of \$150,000;

A document entitled "Summary of Invoices Attachment A, Revenue Generated Report for the Calendar Year 2006." The report lists the invoices submitted the petitioner to Concept Rehab, Toledo, Ohio, for work performed by an employee⁴ from May 6, 2006 to March 1, 2007. The document and invoices show an hourly rate of \$60 an hour for regular hours and an overtime rate of \$90 an hour. The document states that the petitioner paid the claimed employee wages of \$39,858.98, while Concerned Home Care Outsourcing, L.L. C. paid her \$28,961. The document indicates a total of \$158,423.52 billed for the employee's work; that the employee received a total of \$68,820.60; and her work generated additional revenue for the petitioner of \$89,602.92;

A copy of the above-mentioned employee's W-2 Wage and Tax Statements for 2006 that indicate Concerned Home Care Inc. paid her \$39,858.98 and Concerned Home Care Outsourcing L.L.C. paid her \$28,961.62; and

³ The AAO notes that both Forms 1099-MISC identify the same Employer Identification Number (EIN) [REDACTED] that is identified on the I-140 petition. The AAO also notes that Blue Cross Blue Shield payment is sent to the petitioner at [REDACTED], while the United Government Services, payment is sent to the address noted on the I-140 petition.

⁴ The person on the invoices is identified as [REDACTED].

An excerpt from the website for the Department of Health & Human Services, (HHS) Center for Medicare & Medicaid Services (CMS) that describes refinements to the system of reimbursements for Medicare home health services.

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 that filed the I-140 petition is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$1,314,797, a net annual income of \$63,157, and to currently employ thirteen part time employees, and 16 fulltime employees. As stated previously, the petitioner's fiscal year is August 1, to July 31, of the respective year. On the Form ETA 9089, signed by the beneficiary on December 11, 2006, the beneficiary did not claim to have worked for the petitioner.

On the Form I-290B, current counsel asserts that the proffered position is not an ordinary salaried position such as a maintenance worker, but rather a licensed physical therapist whose employment will generate more than sufficient income to cover her salary and benefits. Counsel also notes that the petitioner has an affiliate company, Concerned Home Care Outsourcing, L.L.C., located at the same address that will also pay part of the beneficiary's salary on certain assignments.

Counsel refers to the two Forms W-2 submitted to the record on appeal for a claimed physical therapist employee that both the petitioner and Concerned Home Care Outsourcing, L.L.C. provided the employee. Counsel states that the affiliate's income, combined with the petitioner's net income, is sufficient to pay the proffered wage. Counsel states that the petitioner's line of credit will also be independently available to pay the beneficiary salary for the next three years. Counsel also refers to the petitioner's thirteen years of operation as a factor to be considered in considering the petitioner's circumstances.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Former counsel noted in the petitioner's response to the director's RFE that the Chemical Bank list of deposits and distributions was submitted to demonstrate the petitioner's total revenue for tax year 2006. However, this list is not one of the documents outlined at 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the proffered wage. While the petitioner's 2006 tax return would not necessarily have been available, the Chemical Bank list does not establish any significant increase in the petitioner's net income or net current assets that could be utilized to pay the proffered wage in tax year 2006. This document will not be further considered in these proceedings.

On appeal, counsel and [REDACTED] both state that the petitioner's line of credit must be taken into consideration in determining 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 borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return 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).

Counsel also notes that an affiliate corporation's assets can be utilized to pay the proffered wage. However, 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.” Thus, in these proceedings, the AAO will only examine the petitioner’s tax return.

On appeal, counsel and the petitioner’s officer also state that the proffered position will also pay for itself, since the proffered wage is significantly lower than the petitioner’s charges for these services. However, on appeal, the petitioner submits W-2 Forms that suggest the petitioner could not pay the proffered wage for another employee identified as a contracted employee, and that the employee’s wages were also paid by another partnership. With regard to the projection of the beneficiary’s future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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, contrary to former counsel’s assertion, 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:

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 August 7, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As noted by current counsel, the petitioner’s tax year runs from August 1, to July 31 of the respective year. As of the date of the petitioner’s response to the RFE, the petitioner’s tax year in 2007 would have been over for less than a month. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 is the most recent return available.⁶ The petitioner’s tax return demonstrate its net income for *, as shown in the table below.

In 2005, the Form 1120 stated net income of -\$1,424.

Therefore, for the 2006 tax year, 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

⁶ The appeal materials were submitted on September 11, 2007, at which date the petitioner’s 2007 tax return still might not have been due or available.

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 the petitioner's 2006 tax year as -\$70,033. Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The AAO also notes that USCIS computer records indicate that the petitioner during the years 1995 to 2009 has submitted 65 petitions either I-129 petitions for H-1B non-immigrant workers, or I-140 employment-based immigrant petitions. For example, the employee whose wages and invoices are submitted on appeal appears to be the beneficiary of the petitioner's H-1B petition approved by the Nebraska Service Center for the period May 15, 2005 to October 1, 2007. (LIN 0516252351). With regard to more recent I-140 petitions, the petitioner submitted an I-140 petition (LIN 0625752702) that was denied by the Nebraska Service Center on September 8, 2006. The petitioner then submitted another I-140 petition for the same beneficiary that was approved by the Texas Service Center on January 3, 2007. The petitioner would have to establish its ability to pay for the approved I-140 as well as the instant petition in 2007.

Counsel asserts in his comments on the Form I-290B that the petitioner has another affiliated company that can help to pay the proffered wage, that the petitioner's line of credit could also be utilized to pay the proffered wage, and that the petitioner has been in business for thirteen years. As previously stated, the petitioner's line of credit and the financial resources of another business are not viable factors in determining the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel also states that a physical therapist employee will generate additional revenue beyond his or her hourly wages that can establish the petitioner's ability to pay the proffered wage. Counsel does not, however, take into consideration that any additional revenues may be

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.

utilized to pay the ordinary business expenses of the petitioner. The petitioner's 2005 tax return list salaries and wages of \$705,508, and other expenses of \$32,092 in advertising, \$32,265 in rents, \$46,581 in employee benefit programs, and on Line 27, other deductions of \$363,520.⁸ 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 9089 was accepted for processing by the DOL.

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, based on the information on the petitioner's website, and on the I-140 petition, the petitioner has been in business since 1994 serving at present nine counties in Michigan. The petitioner's longevity is a significant factor in determining the totality of the petitioner's circumstances, and its business viability. The record, though, is unclear as to the petitioner's actual business structure and professional staff whose employment provides the bulk of the petitioner's revenue. Although the petitioner provided a quarterly report of wages, the record does not indicate how many registered physical therapists or other staff such as registered nurses, the petitioner actually employs. The record is also not clear as to whether the petitioner employs certain employees or subcontracts for its professional staff. For example, the employee whose W-2 Forms and invoices were submitted to the record on appeal appears to be the recipient of the petitioner's H-

⁸ Statement Two of the tax return indicates other deductions include \$55,352 for transportation, \$15,560 in worker compensation insurance, \$81,377 in contract services, office supplies & expense of \$18,376, professional fees of \$105,763.

1B petition, although she is identified as a _____ on invoices. The petitioner, based on the invoices, appears to be billing a third party in Ohio for its own employee's contracted services.⁹

These factors presently outweigh the petitioner's longevity. The creation of the second business whose business is to outsource physical therapists also adds to the lack of clarity as to the petitioner's actual business structure. 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.

⁹ The petitioner's quarterly wage reports submitted in response to the director's RFE do identify this person as an employee as of the second quarter of 2007, but report no wages for her as of the end of the 2007 second quarter.