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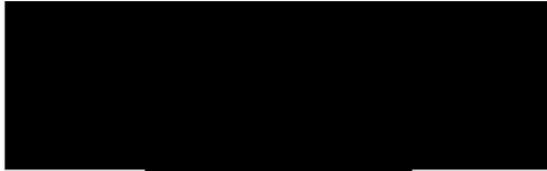
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



**U.S. Citizenship
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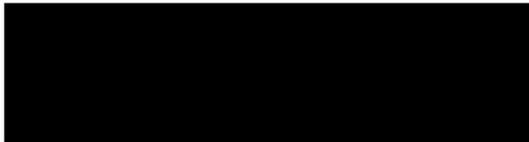
Office: VERMONT SERVICE CENTER

Date: SEP 28 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a courier service. It seeks to employ the beneficiary permanently in the United States as a marketing manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated August 18, 2004, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.¹

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

¹ The AAO notes that although the labor certification requires a Bachelor's of Science degree in the field of marketing, and two years of job experience, the petitioner selected the skilled worker classification on the petition. There is no explanation in the record regarding this inconsistency. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). This deficiency presents an additional ground of ineligibility.

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 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).

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 (BIA 1967).

Here, the Form ETA 750 was accepted for processing by DOL on May 31, 2001, and certified on July 7, 2003. The petitioner filed a Form I-140 petition on December 24, 2003. The proffered wage as stated on the Form ETA 750 is \$65,899.60 per year. The Form ETA 750 states that the position requires a Bachelor's of Science degree in the field of marketing or related field and two years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; a letter from counsel dated December 10, 2003; and the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 1998, 1999, 2000,³ 2001, and 2002.⁴

Counsel also submitted documentation concerning the beneficiary's qualifications: a letter from Asma Gold, Inc. d/b/a Gold Touch, of Ocoee, Florida dated July 29, 2003; a letter from A-1 Department Store of Pune, India, dated July 14, 2003; and an educational credentials evaluation dated April 1, 1997, from A & M Logos International, Inc.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claims to have been established in 1988. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on May 22, 2001, the beneficiary did not claim to have worked for the petitioner.

Accompanying the appeal, counsel submits a legal brief but provides no additional supporting evidence. The regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO. Counsel dated the appeal September 17, 2004. Although counsel stated in the appeal statement that he would submit a brief

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

³ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 1998, 1999 and 2000 federal income tax returns generally.

⁴ The AAO is in receipt of correspondence from [REDACTED] accompanied by his Form G-28, "Notice of Entry of Appearance as Attorney or Representative." A review of recognized organizations and accredited representatives reported in July 2004 by the Executive Office for Immigration Review, does not mention [REDACTED]. Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives.

and/or evidence within 30 days of the date of the appeal, as of this date, the AAO has received nothing further. This deficiency presents an additional ground of ineligibility.

On appeal, counsel asserts that the director failed to consider that the petitioner has continuously been in business since 1988, that it is structured as a S corporation with two shareholders, [REDACTED] and [REDACTED], and that they were paid substantial discretionary sums in the form of officers' compensation.

Counsel also contends that the director failed to take into account the petitioner's gross receipts in 2001 of \$2,915,204.00, and its cash balance (i.e. the end-of-year figure stated on Schedule L, Line 1) and depreciation, that when added together demonstrate the petitioner's ability to pay the proffered wage.

Further, counsel asserts that the director failed to take into account the cost of labor charge in 2001, (i.e. Form 1120S, Schedule A, line 3) of \$478,795.00 and an expense item "Salaries and Wages" in 2001, (i.e. Form 1120S, Line 8) of \$38,019.00, which all demonstrate the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, 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, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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.

Therefore, the petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. 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. Therefore, the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

As already stated, 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. 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 that exceeded the proffered wage is misplaced.

The petitioner's tax returns⁵ demonstrate the following financial information concerning the petitioner's ability to pay:

⁵ 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

- In 2001, the Form 1120S stated net income (Schedule K, Line 23) of \$28,785.00.
- In 2002, the Form 1120S stated net income (Schedule K, Line 23) of <\$288,986.00>.⁶

Since the proffered wage is \$65,899.60 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001 and 2002.

If the net income the petitioner demonstrates it had available during the 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 net current assets during 2001 and 2002 were <\$33,137.00>, and <\$133,736.00>.

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 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2001 and 2002, the petitioner's net income is found on Schedule K of its tax returns.

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁷ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net income, or net current assets, to pay the proffered wage.

As already stated, counsel asserts that the director failed to take into account the petitioner's gross receipts in 2001 of \$2,915,204.00, and its cash balance (i.e. the end-of-year figure stated on Schedule L, Line 1) and depreciation, that when added together demonstrate the petitioner's ability to pay the proffered wage. Reliance on the petitioner's gross receipts that exceeded the proffered wage is misplaced. The petitioner's cash balance is stated on Form 1120S, Schedule L, Line 1. It is a component of net assets and it is utilized in conjunction with current liabilities to determine net current assets. To combine items from the petitioner's Schedule L and items from page one of the Form 1120S would be duplicative of the petitioner's finances. Further, since depreciation is an expense, not an asset, and a component of the calculation of net income, counsel's assertion on appeal is erroneous and again duplicative of the petitioner's finances. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel asserts that the two shareholders of the petitioner were paid substantial discretionary sums in the form of officers' compensation which is evidence of the petitioner's ability to pay the proffered wage. A review of the tax returns submitted indicates that because of officers' compensation withdrawn by the sole shareholders in each year, the petitioner's net income is substantially reduced. As stated below, the petitioner's net income for 2001 and 2002 is less than the proffered wage. Since the company is closely held, the owners may in their business discretion take less officers' compensation. The sole two shareholders of the corporation have 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 Forms 1120S of the IRS U.S. corporation income tax returns submitted. For this reason, the petitioner's figures for compensation of officers may be considered in some instances as additional financial resources in addition to ordinary income.

In 2002 officers' compensation was a significant expense item for all the years examined.⁸ Despite counsel's assertion that officers' compensation is available to pay the proffered wage, there is no evidence in the record that the two shareholders receive a return on their investment and compensation for services other than through officers' compensation. It is not reasonable to assume that the sole shareholders would relinquish their officers' compensation.

Further, there is no evidence in the record to demonstrate that the sole shareholders stated a desire to relinquish in whole or in part their officers' compensation in order to pay the proffered wage. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence.

⁸ In 1998-\$396,796.00; in 1999-\$423,831.00; in 2000-\$450,154.00; in 2001-\$381,133.00; and in 2002-\$460,002.00.

Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

As already stated, counsel asserts that the director failed to take into account the cost of labor charge (in 2001, Form 1120S, Schedule A, line 3) of \$478,795.00 and an expense of “Salaries and Wages” in 2001, (i.e. Form 1120S, Line 8) of \$38,019.00, to demonstrate the ability to pay the proffered wage.

Counsel has not submitted the petitioner’s payroll information other than as summarized in the tax returns submitted as salaries and wages and cost of labor. While the tax returns show a consistent history of payroll expense and payment, this information alone without analyzing the totality of the evidence presented, does not establish the petitioner’s ability to pay the proffered wage. Wages paid to others generally will not demonstrate the petitioner’s ability to pay for the instant beneficiary. Further, labor, wage and salary costs are expenses on the Form 1120S tax return and are a component in the calculation of net income.

Counsel contends, with the permanent employment of the beneficiary as a marketing manager its business income that will increase. The assertions of the petitioner 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). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary’s employment as a marketing manager will significantly increase petitioner’s profits.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date.

Within the letter, counsel references a “margin of safety” for each tax year of the petitioner, 1998, 1999, 2000, 2001 and 2002, for which tax returns were submitted as evidence of the petitioner’s ability to pay. For example in 1998, counsel states that the “margin of safety” was 990%. However, since counsel makes these statements without explaining how these “margins of safety” are derived, the AAO is unable to review them.

Counsel contends that the petitioner has demonstrated “a pattern of ... strong financial positive available cash balances” that shows its ability to pay the proffered wage from 1998 to 2002. Cash is stated on Schedule “L” of the tax returns submitted. It is clear that counsel is suggesting combining the petitioner’s net income each year with the cash also received by the business for that year as

stated on Schedule "L" as current assets. USCIS will consider separately, but not in combination, the net income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To do so would be duplicative of petitioner's finances. Also, on Schedule "L" it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L" as a balance sheet that shows both current assets and current liabilities. Therefore, cash and other current assets are reduced by current liabilities to reach the net current asset figure.

With reference to the petitioner's 2002 tax return, counsel contends the net loss suffered in that year should be disregarded because there were "overwhelming cash available balances in 2002." Counsel references the petitioner's Cash Balance (Schedule L, Line 1), Depreciation Expense (Form 1120S, Line 14),⁹ Other Investments (Schedule L, Line 9), Officers Compensation (Form 1120S, Line 7), Advertising Expenses (Form 1120S, Line 16), Pension, Profit-sharing (Form 1120S, Line 17), Charitable Contributions (Schedule K, Line 7), and Retained Earnings (Schedule K, Line 24).¹⁰ Counsel asserts that the above are "discretionary expenses" stated on the 2002 tax return and are available to pay the proffered wage. Counsel also makes the same contentions based upon the items taken from the petitioner's tax returns for 2001, 2000, 1999, and 1998. Returns for years prior to 2001 (the priority) have little probative value in the determination of the ability to pay. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); 8 C.F.R. § 204.5(g)(2). Further, expenses are not assets available to pay the proffered wage.

Otherwise, counsel has provide no case precedent, law or regulation that would allow the petitioner to utilize what counsel considers "discretionary expenses" to offset its nominal profit in 2001 (less than the proffered wage) and the losses suffered in 2002. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *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. 1998).

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

⁹ Counsel's contention is not supported by judicial precedent. *See River Street Donuts* at 116; *Chi-Feng Chang* at 537.

¹⁰ Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

USCIS will examine the petitioner's size and longevity in an examination of the record of proceeding. The petitioner was incorporated in 1988. Although the number of individuals employed is an important criterion, the petitioner has not submitted payroll information or on appeal regarding the number of individuals it employs through the four years for which tax returns were submitted.

Although not probative evidence for determining the petitioner's ability to pay from the priority date, the petitioner has submitted its tax returns for years prior to 2001. In 2000, the petitioner's gross receipts were \$3,419,921.00, in 1999 gross receipts were \$3,738,030.00, and in 1998 were \$3,586,898.00. Therefore, there is evidence of a decline in the petitioner's business in years 1998, 1999, and 2000. The petitioner's tax returns also demonstrated that the business decline has continued. In the period 2001 to 2002, its gross profits further declined from \$2,915,204.00 to \$2,741,531.00 respectively. From 1998 to 2002, the petitioner's gross receipts had declined 24%. It is clear from the financial evidence presented that the petitioner's business prospects were in a steady decline for the four years for which tax returns were submitted. No explanation was provided by the petitioner for this decline.

There is no evidence submitted to demonstrate that there were unusual or novel expenses, losses or costs that would have depressed the net income of the petitioner from the priority date. However, it is apparent from the tax returns submitted into evidence that the petitioner has suffered a business downturn, and in conjunction with the amounts of the officers' compensation withdrawn each year, the petitioner's net income has been depressed and less than the proffered wage. The petitioner's net current assets for 2001 and 2002 are both negative. The petitioner has not offered prospects for a recovery.

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 from 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.