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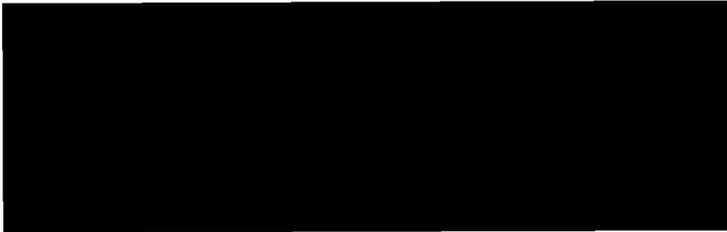
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: LIN 07 196 50372 Office: NEBRASKA SERVICE CENTER

Date: APR 19 2010

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private medical center of optometrists.¹ It seeks to employ the beneficiary permanently in the United States as a public relations representative, marketing. 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 although the petitioner had established its ability to pay the proffered wage in tax years 2001 and 2005, it had not established that it had the continuing ability to pay the beneficiary the proffered wage in tax years 2002, 2003 and 2004. 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 August 2, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider whether the proffered position is a realistic job offer.

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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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,

¹ The petitioner did not identify its business operation on the I-140 petition. On the Form ETA 750 A, Item 8, the petitioner identified itself as a "private medical center/optometrists."

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 April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$67,100.80 per year. The Form ETA 750 states that the position requires four years of college, a Bachelor of Arts degree in communications or journalism, and 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.²

On appeal, counsel submits a brief. Relevant evidence in the record includes the petitioner's Forms 1120, U.S. Tax Return for a Corporation for tax years 2001 to 2005.³ The petitioner also submitted IRS Form 7004, Application for Automatic 6-Month Period of Time to File Certain Business Income Tax, Information, and Other Returns, for tax year 2006.

The federal tax documents indicate the petitioner had the following net income in tax years 2001 to 2005: \$98,821; -\$688,618; -\$925,630; -\$924,861; and \$1,817,454. In response to the director's July 3, 2007 Request for Evidence (RFE), the petitioner also submitted a letter from [REDACTED], the petitioner's accountant. In his letter, [REDACTED] stated that the petitioner's tax losses could be attributed to its depreciation expenses, and if the depreciation were added back to each year's tax loss, the petitioner would have had positive cash flow in tax years 2002, 2003, and 2004. [REDACTED] also noted that the petitioner as of December 31 of tax years 2002, 2003, and 2004 had the following cash: \$419,719 in 2002; \$649,542 in 2003; and \$872,728 in 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner did not indicate its date of establishment; however, its tax returns indicate a date of incorporation of January 5, 1988. The petitioner also did not indicate its gross annual or net annual income, or the current number of employees. According to the tax returns in the

² 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).

³ The petitioner also submitted its state of California income tax returns for tax years 2001 to 2005.

record, the petitioner's fiscal year is the calendar year. The petitioner's tax returns also indicate that it is a personal service corporation. On the Form ETA 750B, signed by the beneficiary on March 22, 2001, the beneficiary claimed that she had worked for the petitioner from May 2000 to April 2003.

On appeal, counsel asserts that the petitioner has fulfilled its evidentiary burden as stated in 8 C.F.R. § 204.5(g)(2) based on the submission of its federal tax returns. Counsel also notes the wages and salaries paid by the petitioner for tax years 2002, 2003, and 2004 and states that the petitioner employs more than 100 employees. Counsel references ██████████ remarks submitted in response to the director's RFE with regard to cash balances available to the petitioner as of December 31, 2002, 2003, and 2004. Counsel notes that the director requested the beneficiary's Form W-2 for tax years 2002, 2003 and 2004, but claims that the beneficiary had not started her employment with the petitioner, and therefore there were no W-2 forms submitted to the record.

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

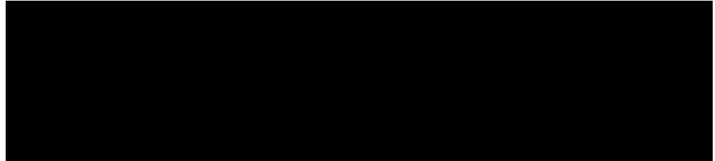
The record contains conflicting information as to whether the beneficiary worked for the petitioner during the relevant period of time in question. On the ETA 750, Part B, signed by the beneficiary on March 22, 2001, the beneficiary indicated that she had worked for the petitioner as of May 2000 and would work for the petitioner until April 2003. The director in his RFE requested W-2 Forms for the beneficiary for tax years 2002, 2003, and 2004. In response to the director's RFE, the petitioner made no reference to any employment of the beneficiary and did not submit any W-2 Forms for the beneficiary. On appeal, counsel states that the beneficiary has not worked for the petitioner.

However, USCIS records indicate that the petitioner filed an I-129 petition for the beneficiary which was approved on May 23, 2000 for an initial three year period of employment.⁴ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Further USCIS computer records indicate that the beneficiary submitted a Form

⁴ USCIS records also indicate that the petitioner filed eleven immigrant or non-immigrant petitions prior to filing the instant petition in 2007. Of the three filed during the instant petition's 2001 priority date, two were approved and one was approved and then subsequently revoked. The remaining petitions were filed prior to the 2001 priority date.

G325A, Biographic Information, in conjunction with a I-485 application of adjustment of status. The beneficiary signed and dated the form on May 15, 2007 under penalty of perjury. According to the G325A, the beneficiary's employment in the United States from 2002 until the filing of the instant petition includes the following:

February 2002 to present time
February 2002 to May 2006
September 2001 to December 2001
January 2000 to August 2001



The beneficiary did not list her previous employment with the petitioner on the G325A, although she entered the United States on January 13, 2002, as an H-1B employee of the petitioner. The beneficiary also indicates that her last employment abroad was an English Instructor at Lebanese American University in Beirut, from February 1993 to August 1998, which conflicts with the employment letter from Tricon Trading contained in the record, that states she worked as a public relations and marketing director from September 1996 to October 1998.

The AAO notes that the beneficiary listed her employment with the petitioner on the ETA 750, Part B, as a public relations representative/marketing manager, between May 2000, a date prior to the priority date of April 6, 2001, to April 2003. Based on the information contained on the subsequent Form G325A, the beneficiary did not work for the petitioner during this period of time. The AAO also notes that if the beneficiary had worked for the petitioner prior to the priority date, the position would not be a new position, as claimed by the petitioner.

Further, the file contains an unsigned letter form the beneficiary dated April 29, 2008. The beneficiary claims that she earned a master's degree from Baylor University in Texas and a teaching certificate (TESOL) from UCLA.⁵ She also claims that she was accepted to pursue an EdD at the University of Southern California in 2006. This letter makes no claim of previous employment with the petitioner, or any work in the field of public relations.

The record contains several inconsistencies and contradictory statements with regard to whether the beneficiary actually ever worked by the petitioner, and whether the proffered position is a new position. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

⁵ USCIS records indicate that the beneficiary was accorded an F-1 (student) non-immigrant visa to attend Southwest Texas State University. This visa was issued in Tijuana on November 21, 1989. There is no further indication that USCIS granted the beneficiary authorization to attend any other school or university.

The beneficiary signed Form ETA 750, which contained a misrepresentation of material fact, namely, her claimed employment with the petitioner, under penalty of perjury. Other statements made by the beneficiary, also under penalty of perjury, on a Form G325-A with regard to earlier employment in Beirut conflict with a letter of work experience submitted to the record with the instant petition written by [REDACTED]⁶

The AAO also notes that public databases indicate that the petitioner filed for bankruptcy protection on February 13, 2002 and emerged from bankruptcy proceedings on August 10, 2004. This fact may indicate that the petitioner may not have been able to offer the beneficiary a bona fide job during tax years 2002 to 2004. Further, the fact that the petitioner did not disclose this fact or provide evidence of a bona fide job during these proceedings suggests a potential misrepresentation of the petitioner's realistic ability to pay the proffered wage during at least two years of the relevant period of time under consideration. The AAO questions the realistic nature of the petitioner's job offer based on the petitioner's bankruptcy and based on the contradictions in the record with regard to the beneficiary's claimed employment with the petitioner. For these reasons alone, the petition may be denied. For illustrative purposes only, the AAO will briefly discuss the petitioner's ability to pay the proffered wage, the initial issue raised by the director in his decision.

On appeal, counsel reiterates [REDACTED] remarks with regard to depreciation expenses, and notes that the petitioner's actual cash flow with depreciation added back clearly illustrates that the petitioner has more than enough cash resources to pay the proffered wage. Counsel then notes that the petitioner paid wages totaling \$3,367,489, \$4,263,859 and \$741,131 for tax years 2002, 2003, and 2004. Counsel states that based on the petitioner's proven track record of paying wages, the petitioner has established its ability to pay the proffered wage of \$67,100.80. Counsel notes that although the wages paid to employees in tax year 2004 appears to have been reduced to \$741,131, the petitioner also paid over \$3.4 million dollars to outside labor.

Counsel states that the AAO should consider the petitioner's totality of circumstances in examining the petitioner's ability to pay the proffered wage. Counsel refers to an unpublished AAO decision and states that based on the same categories as those used in *Matter of _____*,⁷ the petitioner's wages paid and gross sales indicate strong financial viability. Counsel also notes that unlike the petitioner in *Matter of _____*, the instant petitioner had had two years of positive net current assets since the priority date.

The AAO notes that counsel does not provide any citation to the referenced AAO decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the

⁶ Section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, provides that "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." The petitioner needs to resolve the beneficiary's contradictory testimony if it pursues this matter further. Any serious misrepresentations can be considered fraud.

⁷ *In Matter of _____*, reported in 82 No. 35 *Interpreter Releases*, 1437, 1449 (Sept. 12, 2005).

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 suggests that the petitioner's cash balances as of December 31, 2002, 2003, and 2004 should be considered in the examination of the petitioner's ability to pay the proffered wage in these tax years. The AAO notes that the petitioner has not submitted any bank checking statements to the record, which would present significant obstacles to any consideration of the petitioner's cash reserves. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Second, any reliance on the petitioner's cash balances at a specific date would be misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Further on appeal, in reference to 8 C.F.R. § 204.5(g)(2), counsel states that the petitioner has 100 employees. That threshold number relates to the regulation at 8 C.F.R. § 204.5(g)(2) stating that, if the petitioner has 100 employees, the statement of a financial officer may suffice to show the petitioner's ability to pay the proffered wage. In the instant petition, the petitioner has not submitted any such statements from a financial officer or more fully substantiated this assertion. 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. I.N.S.*, 153 F.Supp. 2d 7, 15 (D.D.C. 2001).⁸ The AAO does not find that the petitioner has established that the petitioner employs 100 workers. The petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

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

⁸ As previously discussed, the petitioner did not identify the number of current workers on the I-140 petition. The AAO notes that the petitioner appears to be one office within a network of laser eye center offices. With regard to these proceedings, the petitioner needs to establish the specific number of employees at its office, rather than an overall number of employees for the network of offices.

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. As previously stated, the petitioner did not submit any documentation with regard to any wages paid to the beneficiary, and counsel on appeal states that the beneficiary has not worked for the petitioner. For purposes of these proceedings, the petitioner has to establish its ability to pay the entire proffered wage of \$61,100.80 as of the 2001 priority date and through 2005.

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, and, contrary to counsel's assertions, 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 July 26, 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 2006 federal income tax return would not have necessarily been available. The record indicates the petitioner requested a six month extension to filing its 2006 tax return. Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income for tax year 2001 to 2005, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$98,821.
- In 2002, the Form 1120 stated net income of -\$688,618.
- In 2003, the Form 1120 stated net income of -\$925,630.
- In 2004, the Form 1120 stated net income of -\$924,861.
- In 2005, the Form 1120 stated net income of \$1,817,454.

Therefore, for the years 2002, 2003, and 2004, the petitioner did not have sufficient net income to pay the proffered wage. In tax years 2001 and 2005, the petitioner had 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.⁹ 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 2002 to 2004, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of -\$980,988.
- In 2003, the Form 1120 stated net current assets of -\$783,133.
- In 2004, the Form 1120 stated net current assets of -\$1,394,842.

For the years 2002 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for the 2001 priority year and tax year 2005.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the petitioner has 100 employees, and that the petitioner's depreciation expenses, end-of-year available cash, gross receipts and wages and salaries paid can also be considered in determining the petitioner's ability to pay the proffered wage. As stated previously, the petitioner has not established that it has 100 or more workers, and therefore must submit its tax returns, annual reports or audited financial statements to establish its ability to pay the proffered wage. Further, counsel's assertions with regard to the petitioner's depreciation expenses and cash balances have also been found to be not persuasive. Counsel's assertions on appeal with regard to these issues, 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 counsel correctly notes, 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

⁹According 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.

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 *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.

The AAO notes that the petitioner is a medical practice personal services corporation. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO can recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The record reflects that the petitioner has conducted business operations for over twenty years. The petitioner's website indicates it has ten laser eye care locations in the Los Angeles, Orange County and Peninsula County area, although the location of the proffered job is identified as the Glendora office. In examining the petitioner's totality of circumstances, the AAO cannot comment on the petitioner's number of employees, as the petitioner has not provided any evidentiary documentation to further establish this issue.

The AAO does note that the petitioner paid significant amounts of salaries and wages and cost of labor expenses during the relevant years in question. With regard to wages paid or cost of labor, the

petitioner's tax returns reflect the following wages and salaries and/or cost of labor expenses for tax years 2002 to 2004: \$3,367,489, (wages) in 2002; \$4,263,859 (wages) in 2003; and \$741,131 (wages) and \$3,474,890 (cost of labor) in 2004.¹⁰ The AAO also notes that while the petitioner's gross receipts or sales by themselves cannot be considered when determining the petitioner's ability to pay the proffered wage, the record reflects that the petitioner had a significant business operation during the period of time in question.¹¹

The AAO also notes that the petitioner's tax return in 2003 indicated a name change from [REDACTED] to [REDACTED] and that in tax years 2001 through 2003 [REDACTED] was paid significant and varying officer compensation.¹² The AAO notes that the petitioner identified [REDACTED] and [REDACTED] as its two shareholders during tax years 2001 and 2003, with a respective 69 percent and 33 percent ownership of shares in the petitioner. In 2004 and 2005, the petitioner's tax records only identified [REDACTED] at the sole shareholder, with a 69 percent ownership in the business. [REDACTED] during the entire relevant period of time never received officer compensation. Neither the petitioner nor counsel raised the issue of officer compensation as an indicator of the petitioner's profitability; however, the record indicates that the shareholders appear to have wide-ranging ability to raise or lower the amounts of officer compensation during the relevant period of time in question.

Assessing the totality of the circumstances in this individual case, including the wages, salaries and cost of labor, the gross receipts, and officer compensation, the bankruptcy of the petitioner during tax years 2002 to 2004 that was not disclosed to either the Department of Labor or to USCIS at any point in these proceedings is deemed a significant factor that would impact significantly the issue of whether the petitioner has been a viable business entity during the entire relevant period of time in question. Thus, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing.

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 with regard to its ability to pay the proffered wage.

ORDER: The appeal is dismissed.

¹⁰ The petitioner's salaries and wages paid are identified on line 13, page one of the tax return, while cost of labor is identified on Schedule A, item 3, page two of the return.

¹¹ The petitioner's gross receipts and sales for 2002 to 2004 are as follows: \$13,945,607; \$14,734,341; and \$17,838,632.

¹² The petitioner's tax returns indicate [REDACTED] officer compensation in tax years 2001, 2002, and 2003 was \$303,672; \$616,472; and \$636,783. The second officer received no compensation during these years.