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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**



B6

FILE:



Office: TEXAS SERVICE CENTER

Date: 'AUG 04 2010

IN RE:

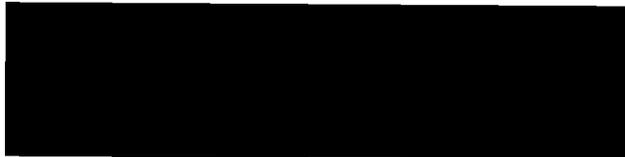
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a reseller of wireless services/products. It seeks to employ the beneficiary permanently in the United States as an information technology consultant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a Form ETA 750, Application for Alien Employment Certification (ETA 750), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish ability to pay the proffered wage to the beneficiary as of the priority date. Accordingly, the petition was denied.

The record shows that the appeal is properly and timely filed, 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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup> and in response to the request for evidence issued by this office.<sup>2</sup>

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.

As the director's August 30, 2007 decision indicates, the primary issue in the instant case is whether the petitioner has established the ability to pay the proffered wage to the beneficiary as of the priority date and continue thereafter until the beneficiary obtains lawful permanent residence.

The regulation 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

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<sup>1</sup> 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).

<sup>2</sup> In adjudicating the instant appeal, the AAO served the petitioner a request for evidence on March 10, 2010 and received the response from counsel for the petitioner on June 1, 2010.

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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 wage, 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).

Here, the Form ETA 750 was accepted on December 31, 2004. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. On the petition, the petitioner claims that it has been established in 1999, to have a gross annual income of \$89,683,623, to have a net annual income of \$104,161, and to currently employ 35 workers. On the Form ETA 750B signed by the beneficiary on December 29, 2004, the beneficiary did not claim to have worked for the petitioner.

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 beneficiary did not claim to have worked for the petitioner. The petitioner submitted the beneficiary's W-2 forms and paystubs from other companies. Wages paid by another corporation cannot be considered in determining the petitioner's ability to pay the proffered wage. Therefore, the petitioner failed to establish its ability to pay the beneficiary the proffered wage from 2004 to the present through the examination of wages actually paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the full proffered wage of \$75,000 per year.

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 (1<sup>st</sup> 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). The petitioner's reliance on its 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).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

on Schedule L, lines 1 through 6. 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. The record contains the petitioner's federal income tax returns for 2004 through 2008. The petitioner's tax returns demonstrate its net income and net current assets for 2004 through 2008, as shown in the table below.

- In 2004, the Form 1120 stated net income<sup>4</sup> of \$875,843 and net current assets of \$520,115.
- In 2005, the Form 1120 stated net income of \$104,161 and net current assets of (\$971,832).
- In 2006, the Form 1120 stated net income of (\$891,137) and net current assets of (\$2,942,297).
- In 2007, the Form 1120 stated net income of \$774,788 and net current assets of (\$2,458,686).
- In 2008, the Form 1120 stated net income of \$901,337 and net current assets of (\$1,713,435).

The petitioner had sufficient net income to pay the instant beneficiary the proffered wage of \$75,000 in the years of 2004, 2005, 2007 and 2008. However, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage in 2006.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions. The petitioner's assertion in response to the AAO's RFE that there is no requirement that the petitioner must show the ability to pay the wage offered to every other beneficiary for whom it has ever filed a visa petition is misplaced. The regulation 8 C.F.R. § 204.5(g)(2) clearly requires that the petitioner demonstrate its ability from the

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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.

<sup>4</sup> 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.

priority date until the beneficiary obtains lawful permanent residence for any employment-based immigrant petition it filed. Memorandum from [REDACTED] For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004) ([REDACTED] memorandum) provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment. The AAO consistently adjudicates appeals in accordance with the [REDACTED] memorandum. However, interpretation of the language in that memorandum cannot comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date for every single petition it filed, especially those approved petitions. The petitioner's net income or net current assets must be used to fulfill its obligation to pay the beneficiaries of the approved petitions first. The AAO will determine whether the petitioner establishes its ability to pay the instant beneficiary the proffered wage with the balance after the petitioner has established its ability to pay the approved beneficiaries with its net income or net current assets.

USCIS records show that the petitioner filed 13 I-140 immigrant petitions (including the instant petition) and 24 I-129 nonimmigrant petitions. Nine I-140 petitions were originally approved but three of the approvals were revoked later and six remain approved<sup>5</sup> for which the petitioner is obligated to pay six proffered wages in 2004, 2005, and 2006, five in 2007, and two in 2008 as well as H-1B employees in addition to the instant beneficiary.<sup>6</sup>

In response to the AAO's RFE, the petitioner submits documentary evidence showing that the priority date for the petition [REDACTED] filed for [REDACTED] is November 9, 2004, that the petition was approved

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<sup>5</sup> USCIS records show that the six approved immigrant petitions are as follows:

- [REDACTED] filed for [REDACTED] on September 12, 2005 with the priority date of April 30, 2001, and approved on June 27, 2006.
- [REDACTED] filed for [REDACTED] on November 15, 2006 with the priority date of April 30, 2001, and approved on July 18, 2007.
- [REDACTED] filed for [REDACTED] on January 16, 2007 with the priority date of March 6, 2003, and approved on December 18, 2007.
- [REDACTED] filed for [REDACTED] on July 11, 2007 with the priority date of April 30, 2001, and approved on December 20, 2007.
- [REDACTED] filed for [REDACTED] on October 15, 2007 with the priority date of November 9, 2004, and approved on February 27, 2009.
- [REDACTED] filed for [REDACTED] on January 3, 2008 with the priority date of December 10, 2003, and approved on September 2, 2008.

<sup>6</sup> The number of the proffered wages the petitioner was obligated to pay is based on the priority dates and the approval dates of these cases. The number might be larger if it were based on the priority dates and the times the beneficiaries obtain lawful permanent resident status pursuant to the regulation.

on February 27, 2009, that the proffered wage is \$45,600 per year, and that the petitioner paid Ingle \$48,000.39 in 2005, \$68,836.30 in 2006, and \$70,379.42 in 2007. The petitioner established its ability to pay Ingle for 2005 through 2007 through wages already paid to this beneficiary. However, the petitioner must establish its ability to pay the full proffered wage of \$45,600 to this beneficiary for 2004, 2008 and 2009 with its net income or net current assets.

In response, the petitioner also submits relevant documents pertinent to the petition. In addition to confirm that the priority date is March 6, 2003 and the approval date is December 18, 2007, these documents indicate that the proffered wage in this matter is \$37,000 per year and that the petitioner paid this beneficiary \$30,992.56 in 2006 and \$22,755.68 in 2007. While the petitioner demonstrated that it paid a partial proffered wage to in 2006 and 2007, the petitioner failed to demonstrate it paid the full proffered wage from 2003 to 2007. The petitioner must demonstrate that it had sufficient net income or net current assets to pay this beneficiary the full proffered wage of \$37,000 per year in 2003 through 2005 and the difference of \$6,007.44 in 2006 and \$14,244.32 in 2007 respectively between wages actually paid to this beneficiary and the proffered wage.

The petitioner did not provide information about the proffered wages for all other four approved petitions. The record does not contain any other documentary evidence showing that the petitioner paid other four beneficiaries of the approved petitions in the relevant years.

Therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay six proffered wages in 2004, total of \$315,199.99<sup>7</sup>, five proffered wages of \$262,666.65 in 2005, four proffered wages plus the difference of \$6,007.44 between wages actually paid to and the proffered wage, total of \$216,140.76, in 2006, three proffered wages plus the difference of \$14,244.32 between wages actually paid to and the proffered wage, total of \$171,844.31, in 2007 and two proffered wages of \$98,133.33 in 2008.<sup>8</sup>

As previously discussed, in 2004 the petitioner had net income of \$875,843 and net current assets of \$520,115, each of them was sufficient to pay the six proffered wages of \$315,199.99 that year and the balance after deducting the five proffered wages from either net income or net current assets was sufficient to pay the instant beneficiary the proffered wage of \$75,000.

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<sup>7</sup> The record shows that the proffered wage for the instant beneficiary is \$75,000 per year, \$45,600 for and \$37,000 for . The record does not contain any information on the proffered wage for other four approved beneficiaries. The AAO adopts the average figure (\$52,533.33) of the three proffered wages as the proffered wage for the other four approved beneficiaries for the purpose of determining whether the petition had the ability to pay all proffered wages in the relevant years in this matter.

<sup>8</sup> As indicated previously, the proffered wage for Ingle is \$45,600 per year; and for the AAO adopts the average proffered wage of \$52,533.33 since the record does not contain any information on his proffered wage.

In 2005, the petitioner had net income of \$104,161 and net current assets of (\$971,832), however, neither its net income nor net current assets were insufficient to pay the five proffered wages of \$262,666.65.

In 2006, the petitioner had net income of (\$891,137) and net current assets of (\$2,942,297), and thus, the petitioner did not have sufficient net income or net current assets to pay a total of \$216,140.76 (four proffered wages plus the difference of \$6,007.44 between wages actually paid to [REDACTED] and the proffered wage).

In 2007, the petitioner had net income of \$774,788 and net current assets of (\$2,458,686). The petitioner's net income was sufficient to pay three proffered wages plus the difference of \$14,244.32 between wages actually paid to Aurora and the proffered wage, total of \$171,844.31 and the balance after deducting the three proffered wages and the difference from net income was sufficient to pay the instant beneficiary the proffered wage of \$75,000.

In 2008, the petitioner had net income of \$901,337 and net current assets of (\$1,713,435). The petitioner's net income was sufficient to pay two proffered wages of \$98,133.33, and the balance after deducting the two proffered wages from net income was sufficient to pay the instant beneficiary the proffered wage of \$75,000 that year.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2004, the petitioner established that it had the ability to pay all proffered wages to the approved beneficiaries as well as the instant beneficiary for 2004, 2007 and 2008, however, the petitioner failed to establish its ability to pay the proffered wages for 2005 and 2006. Therefore, the petitioner failed to establish that it had the continuing ability to pay all the proffered wages including the instant beneficiary from the priority date to the present through an examination of wages paid to the beneficiary, and its net income or net current assets.

The record contains letters from banks pertinent to the balances in the petitioner's business checking accounts and bank statements for the petitioner's business checking accounts as evidence of the ability to pay the proffered wages. Counsel's reliance on the balances in the petitioner's bank accounts is 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 would be considered in determining the petitioner's net current assets.

The petitioner submitted a letter asserting that it has two bank credit lines amounting to more than \$1,500,000 since 2004 which may establish its ability to pay the proffered wage. However, 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).

In the letter dated March 30, 2010, [REDACTED] the president and CEO of the petitioner, states that he would be willing to make his compensation available to cover any possible shortfall. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

USCIS (legacy INS) 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.

The documentation presented here indicates that [REDACTED] holds eighty percent (80%) of the company's stock. According to the petitioner's Form 1120 Schedule E (Compensation of Officers), the company elected to pay him \$430,751 in 2005 and \$615,516 in 2006, respectively. While we note here that the compensation received by [REDACTED] during these two years was not a fixed salary, it is doubtful that the compensation is based on the petitioner's profitability. The AAO notes that in 2004, the petitioner had net income of \$875,843 and [REDACTED] received officer's compensation of \$225,044. However, while the petitioner had only profits of \$104,161 in 2005, the compensation of officer for [REDACTED] was raised to \$430,751 and even to \$615,518 in 2006 but the petitioner had net loss of \$891,137. In addition, these figures of officer's compensation are supported by [REDACTED] W-2 Forms or the petitioner's Quarterly Federal Tax Returns (Form 941) for these two years. The record does not contain [REDACTED] individual tax returns for 2005 and 2006. It is not clear whether the officer's compensations are the only income source for [REDACTED] and how much [REDACTED] need to spend to support himself and his family. The AAO cannot determine whether [REDACTED] would have sufficient funds to forego his partial compensation to cover the shortfall in these two years for which the petitioner failed to establish its ability to pay the proffered wages after supporting his family from his officer's compensation. Further, [REDACTED] expressed his willingness to forego his partial compensation of officer to pay the instant beneficiary the proffered wage. However, the petitioner failed to establish its ability to pay the proffered wages to all the approved beneficiaries before demonstrating that it had sufficient net income or net current assets to pay the instant beneficiary the proffered wage. Therefore, the petitioner would not establish its ability to pay all proffered wages even if [REDACTED] had used his compensation of officer to pay the instant beneficiary the proffered wage. The AAO does not generally accept such a method to establish the petitioner's ability to pay the proffered wage because it will not establish the petitioner's ability to pay all proffered wages as requested by regulations. Therefore, the petitioner has not submitted sufficient documents to demonstrate that [REDACTED] was able to forego a significant percentage of his compensation in 2005 and 2006 and thus the petitioner has not established its ability to pay all proffered wages in these two years through the examination of officers' compensation.

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

outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to establish its ability to pay a single proffered wage for 2006 and failed to demonstrate that it had sufficient net income or net current assets to pay all approved proffered wages in 2005 and 2006. The petitioner failed to submit requested documents for its ability to pay the proffered wages to all approved and pending petitions for the periods from their priority dates to the time of obtaining lawful permanent resident statuses and for the year of 2009 despite the W-2 forms and Tax returns for that year should have been available already when the petitioner responded the AAO's RFE. Given the record as a whole, the history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 all proffered wages for the approved and pending petitions as well as the instant petition. Therefore, the petition cannot be approved. Accordingly, the director's August 30, 2007 decision is affirmed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Counsel's assertions on appeal cannot overcome the grounds of the director's denial. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.