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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
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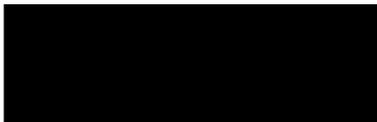
Office: NEBRASKA SERVICE CENTER

Date: FEB 12 2010

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).

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 petitioner¹ is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a flock supervisor. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and 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 denial, the primary 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. Beyond the decision of the director, an additional issue is whether the record establishes that the petitioner is a successor-in-interest to the employer identified in the Form ETA 750.²

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

¹ The petitioner's EIN is [REDACTED]. Farm businesses file Schedules F to report farm income and expenses. See < www.irs.gov/pub/irs-pdf/i1040sf.pdf > accessed on December 26, 2009.

² 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*, 229 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).

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 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 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$13.05 per hour (\$27,144.00 per year). The Form ETA 750 states that the position requires two years of experience in the offered position or two years of experience in the related occupation of "Supervisory Farm Experience."

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.³

On June 25, 2007, the director issued a Request for Evidence (RFE) asking the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. Specifically, the director instructed the petitioner to submit its federal Forms 1040 tax returns, including Schedules C, for 2005 and 2006, a list of the petitioner's monthly recurring household expenses, a copy of the petitioner's checking and savings account statements, and Schedules C for the petitioner's 1040 tax returns for 2001, 2002, 2003, and 2004.

Additionally, the director instructed the petitioner to submit copies of the beneficiary's W-2 "wage-earning statements for 2001, 2002, 2003, 2004, 2005, and 2006." The director requested the beneficiary's most recent pay voucher that would identify the beneficiary, identify the beneficiary's employer that specifies his gross/net pay, income received year-to-date, income received year-to-date, income tax deductions withheld, and the length of the pay period.

In response to the RFE, counsel submitted a letter dated September 13, 2007, and the following evidence: a letter from the petitioner dated September 1, 2007; two 1099-MISC Form statements evidencing compensation paid to [REDACTED] in 2005; a

³ 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).

financial statement dated September 10, 2007, entitled "Vendor Balance Summary;" the petitioner's business banking statement dated June 29, 2007; Schedules F for the sole proprietorship whose principal business product is stated on the Schedules as "poultry" or "chicken production" for 2001, 2002, 2003, and 2004; a letter statement dated September 1, 2007, from the petitioner; and a check register listing four checks dated July 30, 2007, August 10, 2007, August 24, 2007, and September 7, 2007 in the equal amounts of \$500.00 with the entry "Total [the beneficiary]" "-2,000.00."

Other evidence submitted by the petitioner found in the record is as follows: the petitioner's federal Form 1040 tax returns with Schedules F for 2006, and 2007; an amended 2001 Form 1040 return filed in 2002; and unaudited⁴ financial statements dated December 31, 2006.

The director denied the petition on December 14, 2007.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1040.⁵ On the petition, the petitioner claimed to have been established in 1990, and to currently employ two workers. 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 April 17, 2001, the beneficiary did claim to have worked for the sole proprietor since October 1998 to "present," i.e. April 17, 2001.

As a threshold issue, and, beyond the decision of the director, an additional issue is whether the record establishes that the petitioner is a successor-in-interest to the employer identified in the Form ETA 750. The employer identified as [redacted] on the labor certification is a sole proprietorship according to the tax returns and schedules submitted in the record. Therefore, at the time the Form ETA 750 was prepared and accepted, the employer was [redacted] organized and doing business as a sole proprietorship.

⁴ Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁵ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

Thereafter, according to the Office of the Mississippi Secretary of State's website at <<https://business.sos.state.ms.us/imaging/28716656.pdf>>, accessed on December 26, 2009, the petitioner was established as a LLC in the State of Mississippi on December 12, 2005. This was over four years after the Form ETA 750 was accepted by the DOL. The [REDACTED] filed the petition on February 12, 2007.

The sole proprietor of [REDACTED] is [REDACTED] who also appears to be the sole member of the [REDACTED]. According to a plain reading of the record, the sole proprietorship was converted into another form of business organization, a [REDACTED].

However, the [REDACTED] is a separate entity from the sole proprietorship. The general rule for corporations also applies to [REDACTED] and the facts of this case. Like a [REDACTED] because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." As the [REDACTED] was created four years after the acceptance of the Form ETA 750, it is therefore necessary to determine if the [REDACTED] is the successor-in-interest to the sole proprietorship. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Matter of Dial Auto is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between [REDACTED] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [REDACTED] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is*

determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added).

The legacy INS and USCIS has, at times, strictly interpreted *Matter of* [REDACTED] to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of* [REDACTED] the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).⁶ This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists, the petition could be approved.*" (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of* [REDACTED] did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the

⁶The regulation at 20 C.F.R. § 656.30(d) (1987) states:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

Although the record demonstrates that the job opportunity is the same as originally offered on the labor certification, there are no assignment or assumption agreements in the record between the sole proprietor and the [REDACTED] no refinancing instruments for the [REDACTED] no transfers of title from the sole proprietorship to the [REDACTED] no new business permits in the record, no new financing filings or other licensing certificates, or other indicia, to independently substantiate that the [REDACTED] became the successor to the sole proprietorship. There is no assertion by either the petitioner or counsel that the [REDACTED] is the successor-in-interest to the sole proprietorship, and, that the [REDACTED] has assumed all of the rights, duties, and obligations of the sole proprietorship.

The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of [REDACTED]* 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. *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).

The AAO finds that there is insufficient proof in the record that the [REDACTED] is the successor-in-interest to the sole proprietorship, [REDACTED] thus, the petition is not accompanied by a proper labor certification. Accordingly, the petition will be denied for this additional reason.

Assuming the petition is accompanied by a proper labor certification, the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application 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, 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).

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, no wage information such as W-2 or 1099-MISC statements, pay stubs or cancelled checks, were submitted by the petitioner to evidence wage or compensation payments made to the beneficiary. The check register submitted into evidence stating that the beneficiary received \$2,000.00 in 2007 is insufficient evidence without more correlating evidence such as cancelled checks of either wage or compensations payments. The AAO notes that the 2007 Form 1040, Schedule F statement in evidence stated no wage or compensation payments. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 already stated, the petitioner is a [REDACTED] formed in 2005. Prior to 2005, it appears that the petitioner’s sole member operated a poultry business as a sole proprietor, although it is unclear whether the sole proprietor’s business and the [REDACTED] business are the same. *See supra*. Although structured and taxed as a partnership, a [REDACTED] owner(s) enjoy limited liability similar to owners of a corporation. A [REDACTED] like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁷ An investor’s liability is limited to his or her initial investment. Counsel is arguing that the member’s income and assets are available to pay the proffered wage although there is no contract or no other evidence in the record to substantiate this assertion. As the owners are liable only for his, her or their initial investment, the total income and assets of the owners and their ability, if they wished, to pay the company’s debts and obligations, cannot be utilized to demonstrate the petitioner’s ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

The record before the director closed on September 14, 2007, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return with Schedule F is the most recent return available. The tax returns stated net income as detailed in the table below.

The tax returns⁸ reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Sales of livestock, etc. (Schedule F)	\$212,836.00	\$255,477.00
Net farm profit or (loss) (Schedule F)	\$ 10,767.00	<\$12,527.00>. ⁹
Adjusted gross income (line 35)	\$ 33.00	\$31,152.00

⁷ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

⁸ No Form 1040, Schedule F was submitted for 2005.

⁹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

	<u>2003</u>	<u>2004</u>
Sales of livestock, etc. (Schedule F)	\$224,893.00	\$217,318.00
Net farm profit or (loss) (Schedule F)	\$ 74,334.00	\$ 64,180.00
Adjusted gross income (lines 34 & 36)	\$ 69,519.00	\$ 82,456.00
	<u>2006</u>	<u>2007¹⁰</u>
Sales of livestock, etc. (Schedule F)	\$268,010.00	\$252,846.00
Net farm profit or (loss) (Schedule F)	\$ 29,869.00	\$ 30,627.00

Since the proffered wage is \$27,144.00 per year, the sole proprietor had sufficient net income to pay the proffered wage in years 2002, 2003, 2004, excepting consideration of the sole proprietor's monthly recurring household expenses. In 2006 and 2007, the [REDACTED] had sufficient net income to pay the proffered wage. Although the director requested on June 25, 2007, the sole proprietor's monthly recurring household expense, the director stated in his decision that the petitioner's had intermingled the family living expenses and the business expenses in its submittal. Therefore, the director stated that the expenses submitted could not be analyzed and reviewed to ascertain whether or not the petitioner had sufficient net income to pay the proffered wage from the priority date until the sole proprietorship was reputedly converted to a [REDACTED]. See generally *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Insufficient evidence of household expenses was submitted. See *id.*

There is insufficient evidence to establish that the sole proprietor had the ability to pay the proffered wage in 2001 through 2005. No Form 1040 or Schedule F was submitted for 2005 by the petitioner. 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)). Therefore in years 2001, 2002, 2003, 2004, and 2005,¹¹ the sole proprietor had not demonstrated that it had sufficient net income to pay the proffered wage.

On appeal, counsel asserts that the "net incomes" found on the Schedules C and F as submitted with the petitioner's tax returns should have been considered as a "whole," meaning added together. Counsel has not submitted either regulation or case precedent to support his contention. Counsel's contention is misplaced. Counsel has submitted tax schedules for other businesses and for individuals other than the petitioner. According to the petition, the business the petitioner conducts is a chicken farm identified on the Schedules F submitted as "poultry" or "chicken production." From the evidence submitted, the member also operates [REDACTED] (for which Schedules C were submitted), that is identified on the tax schedule as a poultry equipment installation business, but not a poultry production business on a chicken farm. The net income or

¹⁰ No salary, wage, or labor expense is stated on the Schedule F for 2007.

¹¹ As no Schedule F was submitted for 2005, the petitioner did not establish that it had the ability to pay the proffered wage through the examination of net income in 2005.

loss from the member's chicken farm is relevant evidence in these proceedings, not net income or loss from other businesses or individuals that are not the petitioner.

According to counsel, because of exigent circumstances, the petitioner was unable to submit its 2005 tax return. However, the AAO notes that the petitioner has submitted tax returns for 2006 and 2007, and since the appeal was filed on January 16, 2008, the petitioner had ample time to submit its 2005 tax return. The petitioner's failure to submit this tax document cannot be excused. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Further, counsel contends that the director, under the circumstances, should have accepted the Forms 1099-MISC submitted in lieu of the 2005 tax return. Counsel is referring to two 1099-MISC Form statements evidencing compensation paid to [REDACTED] in 2005. There is insufficient evidence in the record that the compensation mentioned in the statements was paid to the petitioner and available to pay the proffered wage. Since the petitioner has failed to submit its 2005 tax return although instructed by the director to do so in his RFE, the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel states on appeal that the petitioner's business banking statement dated June 29, 2007, is evidence of the petitioner's ability to pay the proffered wage. Counsel's reliance on the balance in the petitioner's bank account 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 statement somehow reflect additional available funds that were not reflected on its 2007 tax return.

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. 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 *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.

In the instant case, there is a paucity of evidence regarding the petitioner's market share, business prospects, or payroll. There is insufficient evidence to determine why the petitioner suffered depressed net income in 2001. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.