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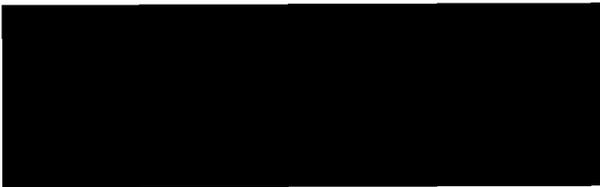
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 20 2010

LIN-07-174-51445

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 or reopen, 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 law office. It seeks to employ the beneficiary permanently in the United States as a paralegal (legal assistant). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 January 9, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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 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 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).

The Form ETA 750 was accepted on July 23, 2001 and certified on February 18, 2004 initially on behalf of the original beneficiary.¹ The proffered wage as stated on the Form ETA 750 is \$22.67 per hour (\$47,153.60 per year based on working 40 hours per week). The Form ETA 750 states that the position requires a bachelor's degree in general studies and two years of experience in the job offered or related occupation as a clerk or legal assistant. The I-140 petition on behalf of the instant beneficiary was submitted on May 23, 2007. The instant petition is for a substituted beneficiary.² On the petition, the petitioner claimed to have been established in 1999,³ to have a gross annual income of \$1,062,488, to have a net annual income of (\$72,081), and to currently employ 10 workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on May 16, 2007, the beneficiary did not claim to have worked for the petitioner.

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

¹ The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

³ However, the petitioner's Form 1065, U.S. Return of Partnership Income for 2001 indicates that the business started January 1, 2001 and the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2004 shows July 19, 2004 as the date incorporated.

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

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, 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 Sonegawa*, 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, the beneficiary did not claim to have worked for the petitioner on the Form ETA 750B. In response to the director's request for evidence dated August 17, 2007, counsel stated that the beneficiary started working for the petitioner in 2006, however, she did not submit the beneficiary's W-2 or 1099 form issued by the petitioner for 2006 showing that the petitioner employed and paid the beneficiary the proffered wage. The record contains copies of the beneficiary's paystubs for period from August 13, 2007 to September 22, 2007 indicating that the beneficiary is working for the petitioner 35 hours per week and paid at the rate of \$22.67 per hour (\$1,586.90 biweekly), and as of September 22, 2007, his Year-to-date earnings from the petitioner are \$12,262.89. If the petitioner had continued to pay the beneficiary the same rate to the end of the year, it would demonstrate that the petitioner had paid the beneficiary in the amount of \$41,259.40 in 2007. Thus, the petitioner demonstrated that it paid partial proffered wage in 2007. The petitioner is still obligated to demonstrate that it had sufficient net income or net current assets to pay the difference of \$5,894.20 to \$34,890.71 between wages actually paid the beneficiary and the proffered wage in 2007, and the full proffered wage in the years 2001 through 2006.

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

⁴ 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).

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 CIS, 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).

Counsel and the petitioner's CPA assert that the petitioner is a sole proprietor. This assertion is misplaced. The evidence in the record of proceeding shows that the petitioner was structured as a

limited liability company (LLC).⁵ The petitioner filed its tax returns as a LLC on Form 1065 for 2001 through 2003,⁶ however, from 2004 it was elected as an S corporation and filed its tax returns on Form 1120S for 2004 through 2007.⁷ In the instant case, the petitioner was formed as an LLC under Virginia law, and should be considered to be a partnership for 2001 through 2003, and an S corporation for 2004 through 2007 for federal tax purposes. An LLC, 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.⁸ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others 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.

The record contains the petitioner's tax returns for 2001 through 2007. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. The petitioner's tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1065 stated net income⁹ of \$169,993.
- In 2002, the Form 1065 stated net income of \$97,641.
- In 2003, the Form 1065 stated net income of \$65,765.
- In 2004, the Form 1120S stated net income¹⁰ of \$14,534.

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 by the IRS 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 by the IRS 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.

⁶ The petitioner's Form 1065 for 2001 through 2003 identify the petitioner as a domestic limited liability company on Schedule B to the Form 1065.

⁷ The petitioner's Form 1120S for 2004 through 2007 indicate on Line A that the S election was effective on August 2, 2004 and on Line D that the corporation was incorporated on July 19, 2004.

⁸ 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.

⁹ Where a LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). *See* Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

- In 2005, the Form 1120S stated net income of (\$8,747).
- In 2006, the Form 1120S stated net income of (\$94,635).
- In 2007, the Form 1120S stated net income of \$42,508.

For the years 2001 through 2003, the petitioner had sufficient net income to pay the instant beneficiary the proffered wage, and for the year 2007, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage. Therefore, the petitioner established its ability to pay the instant beneficiary a single proffered wage for 2001 through 2003 and 2007 through the examination of wages already paid and the net income. However, for 2004 through 2006, the petitioner did not have sufficient net income to pay the instant beneficiary the proffered wage, and thus, failed to establish its ability to pay for these three years.

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.¹¹ An S corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of an S 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 2004 through 2006 as shown below.

- In 2004, the Form 1120S stated net current assets of \$0.
- In 2005, the Form 1120S stated net current assets of (\$3,153).
- In 2006, the Form 1120S stated net current assets of \$31,091.

Therefore, for the years 2004 through 2006, the petitioner had insufficient 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 did not established that it had the continuing ability to pay the instant beneficiary the proffered wage

¹⁰ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

¹¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

in the years of 2004, 2005 and 2006 through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) for two more workers for which the petitioner is obligated to demonstrate its ability to pay each of them the proffered wages during the partial or whole period of years 2004 through 2006.¹² Therefore, the petitioner would need to demonstrate its ability to pay two proffered wages in 2004, three in 2005, three in 2006 and two in 2007 including the instant beneficiary.

The record does not contain any documentary evidence showing that the petitioner had already paid those two additional proffered wages in these relevant years. As previously discussed, the petitioner did not have sufficient net income or net current assets to pay a single proffered wage to the instant beneficiary in the years 2004 through 2006. Therefore, the petitioner failed to establish its ability to pay all proffered wages in 2004 through 2006 through an examination of wages paid to the beneficiaries, or its net income or net current assets.

On appeal, counsel submits bank statements on the petitioner's business checking accounts and claims the balances in the petitioner's business checking accounts can be used to pay the proffered wage and further establish the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's business checking 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

¹² USCIS records show that there are at least two more Form I-140 immigrant petitions filed by the petitioner. The detailed information about these two approved immigrant petitions is as follows:

- EAC-05-216-52758 filed on June 30, 2005 with the priority date of April 22, 2005, and approved on December 20, 2005. The beneficiary was adjusted to lawful permanent resident status on July 12, 2006.
- SRC-07-222-51121 filed on July 13, 2007 with the priority date of May 14, 2004, and approved on February 27, 2008.

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 was considered in determining the petitioner's net current assets.

Counsel and CPA contend that assets of the petitioner's sole owner should be considered in determining the petitioner's ability to pay the proffered wage because it is a sole proprietor. Although [REDACTED] was the only LLC member of the petitioning entity and is the sole shareholder of the S corporation, the LLC and S corporation is registered and formed as a separate and distinct legal entity under the Virginia law. Because an LLC or S 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." Consequently, in the instant case, assets of the shareholder cannot be considered in determining the petitioning entity's ability to pay the proffered wage; the petitioner must establish its ability to pay all the proffered wages with its own net income or net current assets.

As counsel asserts on appeal, 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, while the petitioner's gross receipts have been growing from less than \$500,000 to exceeding \$1 million, its net income has been dropping from \$170,000 to (\$95,000) during the relevant years. Although the petitioner demonstrated that it had sufficient net income to pay the instant beneficiary the proffered wage for the three years 2001 through 2003, the petitioner failed to establish its ability to pay a single proffered wage in the years 2004 through 2006 despite it was obligated to pay two in 2004, three in 2005 and three in 2006. In 2007, the petitioner established its ability to pay the instant beneficiary the proffered wage through the examination of wages already paid to the beneficiary and its net income, however, no evidence in the record can demonstrate that the petitioner had sufficient net income or net current assets to pay the other beneficiary the proffered wage. 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 the proffered wages from the priority date to the present.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.