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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
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U.S. Citizenship and Immigration Services

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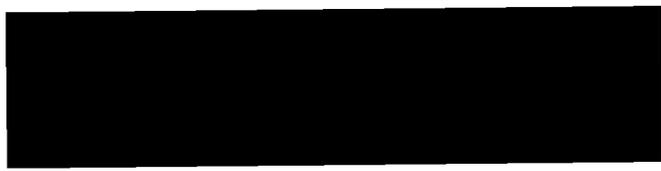
**MAR 16 2010**

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:  
LIN 07 164 51689

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 petitioner<sup>1</sup> is a donut production and sales business. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification,<sup>2</sup> approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record 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, an 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.

Also, beyond the decision of the director, an additional issue in this case is whether the petitioner has the ability to pay the proffered wage from the priority date as well as the proffered wages of an additional beneficiary of another employment based petition from the priority date. 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).

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

<sup>1</sup> According to the petition, the petitioner is [REDACTED]. According to the petitioner's letter dated July 9, 2007, [REDACTED] was previously [REDACTED] and operated under the corporate name of [REDACTED] for one year in 2001."

<sup>2</sup> The labor certification is in the name of [REDACTED]

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.94 per hour (\$31,075.20 per year). The Form ETA 750 states that the position requires four years experience. The name of the employer was corrected by the DOL on October 14, 2006, to state [REDACTED]

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 at 997, 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

On May 23, 2007, the director issued a Request for Evidence (RFE) asking, *inter alia*, for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward.

According to the director, the petitioner has submitted tax returns for [REDACTED] for 2001, 2004, 2005, and 2006; tax returns for [REDACTED] for 2002, 2003, 2004, 2005, and 2006; Wage and Tax Statements (W-2) issued by [REDACTED] to the beneficiary for 2001 and 2002 [sic only 2001]; and, W-2 Statements issued by [REDACTED], to the beneficiary for [2002], 2003, 2004, 2005, and 2006.<sup>4</sup> The director instructed that the petitioner

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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>4</sup> The regulation at 20 C.F.R. § 656.3 states, in part that an "employer" means a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States and possesses a valid EIN. As already stated, the federal Employer Identification Number (EIN) stated on the I-140 petition for the petitioner is [REDACTED]. The EIN is a nine-digit number

provide substantiation for the relevance of evidence to the petitioner's ability to pay the proffered wage. According to counsel's letter dated August 10, 2007, tax returns for [REDACTED], were submitted into the record by mistake.

Further, the director instructed the petitioner to submit evidence, *inter alia*, of its ability to pay the proffered wage from the priority date and onwards, including federal tax returns, annual reports, or "third-party audited financial statements;" and, the director instructed the petitioner to submit the beneficiary's last ten statements of earnings and deductions that identify the beneficiary and his employer, gross/net pay amount, income received year-to date, income tax deductions withheld and the length of the pay period for each particular statement.

Counsel responded to the RFE on August 15, 2007, and submitted a legal brief and [REDACTED] Form W-3 Transmittal of Wage and Tax Statements; approximately [REDACTED] Form W-2 Statements for 2001 including a W-2 issued to the beneficiary in the amount of \$29,425.00 for that year; [REDACTED] Form 940 Employer's Annual Federal Unemployment Tax Return (FUTA) for 2001; and, various State of Michigan sales, use and withholding tax, and quarterly wage and tax report statements for 2001 which included the beneficiary's year-to-date wage earnings.

Additionally, in response to the director's RFE, the petitioner submitted, *inter alia*, a letter statement dated July 9, 2007; the petitioner's business license, with an expiration date of April 30, 2008; the Articles of Incorporation of [REDACTED]; and, the beneficiary's earnings statements from [REDACTED], for the time period February 24, 2007, to July 20, 2007 stating year-to-date gross earnings of \$8,000.00.

On appeal, counsel submitted a legal brief, and, a 2001 federal tax return for [REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

There are three corporations mentioned in the record:

- [REDACTED]. EIN [REDACTED]. According to the State of Michigan website<sup>5</sup> accessed on February 22, 2010, [REDACTED] is an active Michigan corporation

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assigned by the IRS. Each business entity must have a unique EIN. See <<http://www.irs.gov/businesses/small/article/0,,id=169067,00.html>> accessed November 19, 2009.

<sup>5</sup><[http://www.dleg.state.mi.us/bcs\\_corp/dt\\_corp.asp?id\\_nbr=376056&name\\_entity=\[REDACTED\]](http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=376056&name_entity=[REDACTED])>

incorporated on January 6, 1993. This is the employer originally stated on the Form ETA 750, later amended prior to certification to state [REDACTED]

The AAO notes [REDACTED] was incorporated approximately six months after the labor certification.

- [REDACTED] EIN [REDACTED]. According to the State of Michigan website<sup>6</sup> accessed on February 22, 2010, [REDACTED] is an active Michigan corporation incorporated on September 20, 1996.
- [REDACTED] EIN [REDACTED]. According to the State of Michigan website<sup>7</sup> accessed on February 22, 2010, [REDACTED] is an active Michigan corporation incorporated on November 2, 2001. This is the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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).

The instant case concerns a predecessor-in-interest, [REDACTED], and the petitioner, [REDACTED], the successor to [REDACTED]. The petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I & N Dec. 481 (Comm.1986). The petitioner indicated in a letter dated July 9, 2007, that the predecessor operated the business only in 2001. Thereafter, the business was operated by the petitioner. Accordingly, the petitioner must establish that its predecessor had the ability to pay the proffered wage in 2001 (and that portion of 2002 during which it operated the business), and that the petitioner has the continuing ability to pay the proffered wage beginning in 2002.

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.

<sup>6</sup><[http://www.dleg.state.mi.us/bcs\\_corp/dt\\_corp.asp?id\\_nbr=\[REDACTED\]&name\\_entity=\[REDACTED\]](http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=[REDACTED]&name_entity=[REDACTED])>

<sup>7</sup><[http://www.dleg.state.mi.us/bcs\\_corp/dt\\_corp.asp?id\\_nbr=\[REDACTED\]&name\\_entity=\[REDACTED\]](http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=[REDACTED]&name_entity=[REDACTED])>

As set forth below, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

The Beneficiary's Employers and Wages

	<u>Proffered Wage</u>	<u>Difference</u>
<ul style="list-style-type: none"> <li>2001-\$29,425.00</li> <li>2002-\$6,115.00</li> </ul>	<p>\$31,075.20</p> <p>\$31,075.20</p>	<p>\$1,650.20</p> <p>\$24,960.20</p>
	<u>Proffered Wage</u>	<u>Difference</u>
<ul style="list-style-type: none"> <li>2002-\$11,890.00</li> <li>2003-\$15,420.00</li> <li>2004-\$15,600.00</li> <li>2005-\$21,800.00</li> <li>2006-\$20,800.00</li> <li>2007-\$8,000.00 YTD</li> </ul>	<p>\$31,075.20</p> <p>\$31,075.20</p> <p>\$31,075.20</p> <p>\$31,075.20</p> <p>\$31,075.20</p> <p>\$31,075.20</p>	<p>\$19,185.20</p> <p>\$15,655.20</p> <p>\$15,475.20</p> <p>\$9,275.20</p> <p>\$10,275.20</p> <p>\$23,075.20</p>

In the instant case, the petitioner has not established that it or the predecessor employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS should have considered income before expenses were paid rather than net income.

On appeal, counsel asserts that the sum of the petitioner's net income and depreciation could be utilized to pay the proffered wage. Counsel's assertion is misplaced. With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on August 15, 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 was not yet due. Therefore, the petitioner's income tax return for 2006 was the most recent return available. The petitioner's and its predecessor-in-interest's tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>8</sup> of \$118,342.00.

<sup>8</sup> 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 (1997-2003) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 22, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits,

- The petitioner did not submit a tax return for 2002.

- In 2002, the Form 1120 stated net income<sup>9</sup> of \$11,416.00.
- In 2003, the Form 1120 stated net income loss of <\$1,379.00>.<sup>10</sup>
- In 2004, the Form 1120 stated net income loss of <\$4,234.00>.
- In 2005, the Form 1120 stated net income loss of <\$7,306.00>.
- In 2006, the Form 1120 stated net income of \$3,031.00.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between wages actually paid and the proffered wage, for years 2002, 2003, 2004, 2005, and 2006. In 2001, the petitioner's predecessor-in-interest could pay the proffered wage.

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>11</sup> A 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 a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$16,888.00.<sup>12</sup>
- In 2003, the Form 1120S stated net current assets of \$3,722.00.
- In 2004, the Form 1120S stated net current assets of \$3,479.00.
- In 2005, the Form 1120S stated net current assets of \$10,444.00.
- In 2006, the Form 1120S stated net current assets of \$8,994.00.

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etc.). Because the petitioner had additional deductions other adjustments shown on its Schedule K for 2001, the petitioner's net income is found on Schedule K of its tax return.

<sup>9</sup> Form 1120, line 28.

<sup>10</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>11</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, 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>12</sup> As noted above, the petitioner did not submit tax returns, or other pertinent evidence, establishing the net current assets of the predecessor-in-interest in 2002.

Therefore, for the years 2002, 2003, 2004, and 2006, the petitioner or its predecessor-in-interest, did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets in years 2002, 2003, 2004, and 2006.

An additional issue in this case is whether the petitioner has the ability to pay the proffered wage from the priority date as well as the proffered wage of an additional beneficiary of an employment based petition from the priority date. USCIS records indicate that the petitioner has filed one other I-140 petition.<sup>13</sup> The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). No evidence was submitted by the petitioner concerning this additional wage obligation. 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)). This is an additional reason for ineligibility.

On appeal, counsel asserts that the director failed to calculate the petitioner's net current assets correctly for 2003, 2004, 2005, and 2006, because counsel asserts current assets include the figure stated on the petitioner's tax returns at Schedules L, Line 10, as depreciation. As already stated, "amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages." *See River Street Donuts*, at 116.

On appeal, and according to a letter statement dated July 9, 2007, the petitioner stated that assets and income from Salloum, Inc., are available to the petitioner to pay the proffered wage. Contrary to counsel's assertion, USCIS 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.

Counsel states that the petitioner has an additional \$3,031.00 on Form 1120, Line 30, in 2006, that according to counsel is available to pay the proffered wage. Counsel has not submitted either regulation or case precedent to support his contention. Further, the petitioner entered zero on Form 1120, Line 30, in 2006, not \$3,031.00.

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<sup>13</sup> USCIS record number LIN0803051069.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in years 2002, 2003, 2004, and 2006.

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 *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's predecessor-in-interest stated gross income of \$1,069,518.00 in 2001, and after five years of generally declining gross receipts, the petitioner stated \$358,534.00 in gross receipts for 2006. With or without the 2001 tax return, the petitioner's gross receipts were in decline according to the tax returns submitted. Examining the petitioner's tax returns for 2003 through 2006, shows that wage expense was more or less constant, and for years 2004, 2005, and 2006, the owner of the corporation did not draw any officers' compensation, and drew only \$1,800.00 in 2003. It is clear that there was not enough gross income to overcome the petitioner's expenses resulting in nominal or negative net incomes. There is a paucity of information in the record concerning the petitioner's business prospects, and reputation in its market sector. 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 denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.