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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



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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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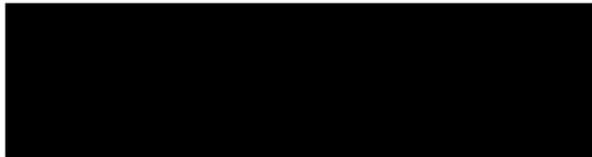
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

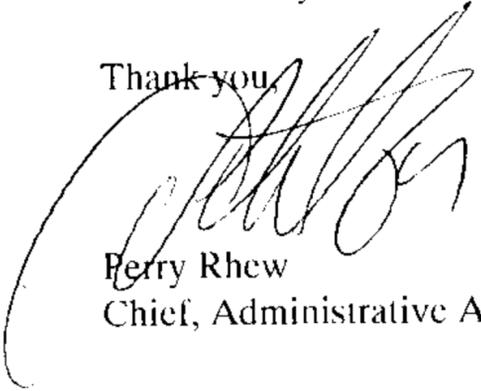


INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. In two subsequent motions to reopen and reconsider, the motions were granted and the director's decisions were reaffirmed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a maintenance company. It seeks to employ the beneficiary permanently in the United States as a residential window cleaner. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that 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 November 13, 2009 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on April 12, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional (requiring a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of training or experience).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

¹ 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

As an additional basis for dismissal, the AAO finds that the labor certification submitted does not support the I-140 category requested and the petition will be denied on this basis as well. Neither counsel nor the petitioner assert that the petitioner made a typographical error on Form I-140 and that the petitioner intended to check Part 2.g. indicating that it was filing the petition for an other worker, instead of box 2.e., which it checked to file for a skilled worker.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification Form ETA 750 indicates that neither education nor experience is required to perform satisfactorily the job duties of the proffered position.² However, the petitioner requested the professional or skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee, select the proper category and submit the required documentation. For this reason, the petition cannot be approved. However, the petition cannot be approved for another reason as well. As set forth by the director, the petitioner has not established its ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residence.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R.

on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² From the Form ETA 750 in the record, it appears that the petitioner initially required two years of experience, but that requirement was "whited out" and the correction was stamped and approved by DOL.

§ 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1983 and to currently employ three workers. According to the tax returns in the record, the petitioner was incorporated on May 29, 1986 and the petitioner's fiscal year is based on a calendar year. The Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$532.80 per week which equates to \$27,705.60 per year³ based on a 40-hour week.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, the director determined that the petitioner did not have sufficient net income or net current assets to pay the full proffered wage for two (2002 and 2006) out of the seven (2003, 2004, 2005, 2007 and 2008) years.

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage. The petitioner has not established that it employed and paid the beneficiary any wages from the priority date, April 27, 2001, and onwards.

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); *Taco Especial v.*

³ The director erred in stating that the beneficiary's proposed annual salary is \$27,695.20. Therefore, this portion of the director's decision is withdrawn.

Napolitano, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 July 7, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the

petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 would be the most recent return available. In his RFE following the petitioner's filing of its motion, the director stated that the petitioner had submitted: a letter with the amount of the sole corporate officer of the petitioning entity, [REDACTED] personal annual expenses in 2002 and 2006, a list of [REDACTED] itemized monthly expenses, his 2002 Form 1040 Individual Income Tax Return, his personal MasterCard account statements for July 2002, September through December 2002 and January 12, 2006 through December 12, 2006, his personal Citibank checking and saving accounts statements from May 13, 2002 through January 13, 2003 and January 13, 2006 through January 11, 2007 and the company's 2008 Form 1120S federal income tax return.

In examining the petitioner's tax returns, they demonstrate its net income as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net income⁴ of \$17,735.
- In 2002, the petitioner's Form 1120S stated net income of -\$150.
- In 2003, the petitioner's Form 1120S stated net income of \$30,978.
- In 2004, the petitioner's Form 1120S stated net income of \$50,092.
- In 2005, the petitioner's Form 1120S stated net income of \$48,873.
- In 2006, the petitioner's Form 1120S stated net income⁵ of \$21,516.

⁴ The director erred in stating that the petitioner established its ability to pay the proffered wage in 2001. In his April 16, 2009 decision, the director also erred in calculating the petitioner's net income for 2001, 2004 and 2005. Therefore, this portion of the director's decision is withdrawn. 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) line 17e* (2004-2005) line 18* (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed as of September 8, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for all the relevant years for 2001 through 2008, the petitioner's net income is found on Schedule K of its tax return. The director relied instead on the petitioner's net income from line 21, page one.

⁵ In his April 16, 2009 decision, the director erred in calculating the petitioner's net income as \$21,696 for the 2006 tax year. The petitioner's net income for 2006 is found on line 18, Schedule K, and not line 21. Therefore, this portion of the decision is withdrawn. Further, the petitioner's 2006 U.S. Income Tax Return submitted with a second I-140 petition, [REDACTED] reflects different numerical figures on the return and a net income of \$47,935. The reason for this difference is unclear. Absent any explanation, the petitioner's 2006 tax return will not be accepted. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the

- In 2007, the petitioner's Form 1120S stated net income⁶ of \$31,019.
- In 2008, the petitioner's Form 1120S stated net income of \$56,460.

The petitioner did not have sufficient net income to pay the beneficiary's proffered wage for the years 2001 through 2002 and 2006 from its net income. For the years 2003 through 2005 and 2007 through 2008, the petitioner would have sufficient net income to pay the instant beneficiary's proffered wage. However, USCIS records indicate that the petitioner has filed three I-140 petitions, including the instant petition. One of the petitions was approved on October 19, 2001 and the USCIS records reflect that the other petition, [REDACTED], that was filed on November 25, 2006 is still pending. The other petition has a May 2, 2001 priority date and states an annual wage of \$31,200. The petitioner would need to establish that it could pay for two sponsored workers from the priority date and onwards. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the respective priority date until each respective beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). None of the petitioner's net income figures indicate that the petitioner could pay both sponsored workers.

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.⁷ 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.

In his decision, the director erred in calculating the petitioner's net current assets for 2002. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net current assets of \$11,070.
- In 2002, the petitioner's Form 1120S stated net current assets of -\$9,445.
- In 2003, the petitioner's Form 1120S stated net current assets of -\$32,703.
- In 2004, the petitioner's Form 1120S stated net current assets of -\$10,811.

petitioner submits competent objective evidence pointing to where the truth lies. No evidence of record resolves these inconsistencies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁶ In his April 16, 2009 decision, the director erred in calculating the petitioner's net income as \$31,139 for the 2007 tax year. The petitioner's net income for 2007 is found on line 18, Schedule K, and not line 21. Therefore, this portion of the director's decision is withdrawn.

⁷ 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 2005, the petitioner's Form 1120S stated net current assets⁸ of -\$86,291.
- In 2006, the petitioner's Form 1120S stated net current assets⁹ of -\$27,872.
- In 2007, the petitioner's Form 1120S stated net current assets of \$27,876.
- In 2008, the petitioner's Form 1120S stated net current assets of -\$3,348.

The petitioner could not have paid the beneficiary's proffered wage of \$27,705 from its net current assets in 2001 through 2006 and 2008 but it could have paid the beneficiary's proffered wages from its net current assets in 2007. However, the petitioner filed for another worker on November 26, 2006 with a 2001 priority date which is still pending. The petitioner has not established its ability to pay both the beneficiary's proffered wage and the other sponsored worker's wages from its net current assets or net income in any of the relevant years.

On appeal, counsel reiterated that the petitioner could pay the proffered wage if the sole officer deferred taking any compensation for 2002 and 2006. The officer's compensation in 2001, 2002 and 2006 is \$46,205, \$43,707 and \$40,000, respectively. In his letter dated June 25, 2009, counsel states that the sole shareholder's personal annual expenses for 2002 and 2006 were \$25,800 and \$71,724, respectively. Counsel states that the evidence provided regarding the petitioner's owner's personal funds is enough to pay the petitioner's owner's personal living expenses. If the beneficiary's annual salary of \$27,705 was taken out of the officer's compensation for 2001, 2002, and 2006, it would leave a remaining \$18,500, \$16,002 and \$12,295, respectively, and negative income when the second worker's pay is considered. Counsel did not take into consideration the other petition [REDACTED] filed by the petitioner with a salary of \$31,200. The petitioner cannot establish its ability to pay the beneficiary's proffered wage of \$27,705 and the second worker's wage of \$31,200 from the officer's compensation in 2001, 2002 and 2006. The petitioner is responsible for paying its sponsored workers wages and the beneficiary's proffered wage from the 2001 priority date and onwards.

In any further filings, the petitioner must submit evidence that the sole shareholder is willing and able to forgo officer compensation, including a notarized statement that he was able in all the applicable years to forego compensation,¹⁰ the total wage obligation owed for each beneficiary from

⁸ In his April 16, 2009 decision, the director erred in calculating the net current assets as -\$90,869. Therefore, this portion of the director's decision is withdrawn.

⁹ The petitioner's 2006 U.S. Income Tax Return submitted with receipt number [REDACTED] reflects different numerical figures on the return and net current assets of -\$16,523. It is incumbent upon the applicant 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. No evidence of record resolves these inconsistencies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

¹⁰ The shareholder's statement says that he would have been "willing to forego part of his compensation for the years 2002 and 2006 in order to cover the proffered wage." This does not account for the wage of the second worker. Considering the wages of both sponsored workers, the petitioner's net income appears insufficient in all years from 2001 through 2008 and officer

each respective priority date and evidence that he can realistically forgo that amount of compensation.¹¹ In totaling both wages, nothing in the record reflects that it is realistic the officer was able to forgo close to 100 percent of his officer compensation in 2001 through 2002 and 2006 to pay both sponsored workers. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Additionally, as the petitioner had negative net income in 2002 and negative net current assets in 2002 through 2006 and 2008, it is not entirely credible if officer compensation would be foregone, that it would go to payment of wages and not to other debt reduction.

The petitioner provided his Citibank personal savings and checking bank accounts and his MasterCard account showing his credit lines available. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Additionally, the petitioning entity is a corporation and the shareholder(s) of the corporation are provided legal liability protection. Unlike a sole proprietorship, a corporation exists as an entity apart from the individual owner(s). *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Contrary to the petitioner's assertions, 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.¹² 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.

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 premise of *Sitar* lies in the regulation at 8 C.F.R. § 204.5(g)(2), which is binding on USCIS. The regulation clearly states that the "prospective United States employer" must show it has the ability to pay the proffered wage.

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 from the day the Form ETA 750 was accepted for processing by the DOL.

compensation would need to be utilized in each year. The statement does not reflect that the shareholder was able or willing to forgo officer compensation in all years.

¹¹ Neither filing contains any record of prior payment to either sponsored worker, so that the total wage obligation appears to be \$58,905 for each year from 2001 onward.

¹² If the sole shareholder submitted these documents to evidence funds to support himself and that he could forego officer compensation, the amounts available would be insufficient to establish that he could pay his estimated personal expenses after foregoing close to 100 percent of compensation to pay both sponsored workers.

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

In the instant case, the petitioner was incorporated on May 29, 1986 and currently employs three individuals. The petitioner's tax returns show fairly low net income in 2001 through 2002 and either low or negative net current assets for all the years represented. The petitioner must demonstrate that it can pay all of its sponsored workers including the beneficiary from the priority date until the beneficiary obtains permanent residence. Here, the petitioner has sponsored a second worker. In the instant case, the petitioner has not provided evidence of its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, April 27, 2001, through the present.

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.