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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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FILE:



Office: TEXAS SERVICE CENTER

Date **OCT 20 2010**

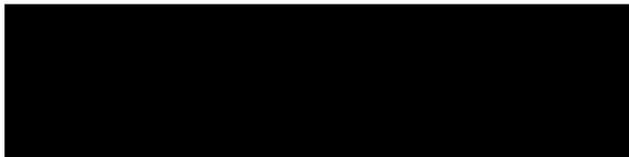
IN RE:

Petitioner: [Redacted]

Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with a consular investigation, the director issued an automatic revocation of the instant matter, pursuant to 8. C.F.R. § 205.1 (a) (3)(iii)(D). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Chinese food. The petition was filed for classification of the beneficiary under section 203(b)(3) of the Immigration and Nationality Act (the Act). As required by statute, the petition was accompanied by an individual labor certification certified by the Department of Labor (DOL). The United States Citizenship and Immigration Services (USCIS) approved the petition on December 9, 2005. On August 29, 2009, the director, Texas Service Center, issued a Notice of Revocation. Citing the regulation at 8 C.F.R. 205.1 (a)(3)(iii)D), *Automatic Revocations*, the director stated that the I-140 petitioner had been closed due to Hurricane Katrina and then reopened in a new location. The director states that the beneficiary was not qualified for the EB3 visa because the petitioner's business was terminated.

The record shows that the appeal of the revocation 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 August 13, 2009 revocation, the initial issue in this case is whether or not the closing of the petitioner's restaurant due to Hurricane Katrina and its reopening in a different location invalidates the prior approval of the I-140 petition. The AAO will also examine whether the consular reports and other evidence contained in the record would be additional grounds to revoke the petition. Finally the AAO will examine whether the petitioner has established its ability to pay the proffered wage to the beneficiary and any other beneficiaries of pending I-140 petitions.

The petitioner's Form ETA 750 was filed with the Department of Labor (DOL) on October 7, 2002. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on November 28, 2005, which was approved on December 9, 2005.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On appeal, counsel asserts that the regulation at 8 C.F.R. 205.1(a)(3)(iii)(D) did not apply to the instant matter because the petitioner's business was not terminated. Counsel states that due to the complete destruction of the petitioner's restaurant at the [REDACTED] location, the petitioner was unable to operate its business from August 28, 2005 to November 30, 2007. Counsel states that the petitioner was unable to refurbish and reopen at the old site, so the petitioner's owner decided to relocate. Counsel states the petitioner's restaurant is now located at [REDACTED]

██████████ approximately three and a half miles from the original location. Counsel states the petitioner is submitting a copy of the petitioner's corporate change of address with the appeal.¹ Counsel also notes that the *Times Picayune* newspaper in which the petitioner placed its classified advertisements for the labor certification recruitment services both locations and it is the daily newspaper for the Greater New Orleans area which includes New Orleans and Metairie.

Counsel states that an act of nature and circumstances beyond the petitioner's control forced the petitioner to place its restaurant business on temporary hold while the petitioner rebuilt, and that at no time did the petitioner terminate its business. Counsel states that the petitioner filed its U.S. corporate income tax returns while it was rebuilding and continues to do so as an ongoing business.²

On May 26, 2010, the AAO issued a Notice of Intent to Deny (NOID) the petition. The AAO noted that the state of Louisiana Secretary of State website indicated that ██████████ with a trade name of ██████████ located at ██████████ is inactive and expired as of December 29, 2009. The same website indicates that ██████████ located at ██████████ is active although not in good standing for failure to file its annual report. ██████████ the petitioner's sole officer, is identified as the registered agent for this business. The AAO requested further evidence as to the petitioner's current corporate status.

The AAO also noted that the record contained several reports not mentioned in the director's decision. A memorandum from the National Visa Center, Portsmouth, New Hampshire, to the Texas Service Center dated August 25, 2008 noted that the beneficiary appears to be not eligible for the employment-based skilled worker visa because "the petitioner has been bought out by another company." The AAO also noted an earlier consular report from Quanzhou, China, dated May 23, 2008, in the record. In this report, the writer cites to 9 FAM 40.51 N4.6-1, and states that a new Form I-140 must be filed if the petitioner has been bought out by, or merged into, another corporation; has experienced a major organizational change; has changed its name; or the assets of a corporate petitioner have been sold, or there is a change in the location of the business entity where the applicant will be employed.

The report writer stated that when the beneficiary appeared for an interview in May 2008, he stated under oath that ██████████ re-opened in December 2007. The report writer then stated that in the two year period that the restaurant was closed it underwent a major organizational change, and that the petitioner is now located at a wholly different address. The writer stated that the petitioner MUST refile. (Emphasis in original). The writer also stated that the petitioner filed 13 petitions for Chinese specialty cooks in recent years, and that the beneficiary was unfamiliar with any of the other applicants. The writer also noted that an investigation at the consular post revealed that a number of

¹ The document submitted by counsel is entitled Commercial Division Corporations Database, Louisiana Secretary of State Detailed Report, and indicates that the petitioner identified as ██████████ is active in good standing with mailing and domicile address identified as ██████████ with its last report filed on October 15, 2007.

² The AAO notes that counsel does not submit the petitioner's later tax returns to the record.

the beneficiaries who were issued their visas to work at [REDACTED] either never worked at the restaurant or only worked there briefly. The AAO noted that the record does not contain any further evidence with regard to the findings of the consular post. The AAO requested evidence as to the petitioner's actual number of I-140 petition filed, the job for which beneficiary were petitioned, their proffered wage, and evidence that the beneficiary worked for the petitioner and the periods of time these beneficiaries worked for the petitioner.

The AAO also noted that the multiple petitions filed by the petitioner raised questions as to the petitioner's ability to pay the proffered wage for multiple beneficiaries. In particular, the AAO requested further evidence as to the petitioner's ability to the proffered wages of both the instant beneficiary and an additional beneficiary for whom an I-140 petition was filed in 2005.

In response, counsel submitted further evidence with regard to the petitioner's corporate status. Counsel submitted copies of the petitioner's domestic corporation annual report that were filed with the Louisiana Secretary of State from 1998 to 2009. Counsel also submitted a report from the State of Louisiana Secretary of State dated June 22, 2010 that indicates the petitioner is active and in good standing as of June 2, 2010. Counsel also submits a copy of the minutes of the petitioner's board of director meeting October 10, 2007 in which it states that [REDACTED] would hold 100 percent interest in the stock in the petitioner.

The petitioner also submits a list of thirteen individuals with periods of employment listed, job titles of either cooks or chefs, and remarks as to their current employment. The petitioner identifies these individuals as its I-140 beneficiaries and indicates at least two beneficiaries beginning their employment with the petitioner in 1997 and working for the petitioner to the present. The list also identifies one beneficiary who worked for the petitioner from April 2000 to August 2000 and then left the petitioner's employment because he or she did not like the New Orleans weather; four beneficiaries who began their employment with the beneficiary from February 2001 to May 2002 and then left in August 2005 after Hurricane Katrina; and one beneficiary who worked for the petitioner in June 2002 and left in September 2002 because he did not get along with the other cooks. The list also identifies three individuals, including the instant beneficiary, whose I-140 petition approvals were revoked, one individual who appears to be the petitioner's owner whose I-140 petition was withdrawn, and one individual whose I-140 petition is pending.

The petitioner submits payroll records from Heartland Payroll Co. Check Register for June 2009 that shows twelve employees with two of the beneficiaries listed on the petitioner's list as receiving salaries. It also submitted its payroll records for June 30, 2003, September 30, 2003, and December 31, 2003; and for all quarters of tax year 2004 and 2005. The petitioner also submitted a Form 941 Employer's Quarterly Federal Tax Return, for the last quarter of 2005 that indicates no wages, tips, and other compensation were paid in that period, while earlier Forms 941 indicate that \$52,702.26 was paid in wages, tips and other compensation in the third quarter of 2005; \$75,670.40 was paid in the second quarter, and \$76,461.52 were paid in the first quarter of 2005, and Forms 941 for three quarters of 2003.

The petitioner also submitted a letter from Paychex, dated June 29, 2010, addressed to the petitioner that states the petitioner started using Paychex in 1994 and left their service in 2005. states that Paychex has payroll reports beginning with the first quarter 2003 to December 31, 2004, but that no records prior to that quarter exist as Hurricane Katrina destroyed all client payroll records, and Paychex no longer has copies of records prior to that date.

The petitioner also submitted its Forms 1120 for tax years 2002 to 2009, a profit and Loss statement from January through May 2010, a bank statement from Chase Bank that states an ending balance of \$103,233.37 as of May 28, 2010; documentation from Chase Bank as to a high interest savings account maintained by the petitioner's owner as of August 17, 2009; and the petitioner's owner's Form 1040 for tax year 2009. The petitioner also submitted the petitioner's balance for a Hiberna commercial checking account as of October 31, 2005 that indicates an ending balance of \$43,238.99, and a Certificate of Deposit from Capital One in the amount of \$70,000 that indicates the CD is maturing on October 6, 2006.

the petitioner's owner submitted a letter dated June 24, 2010 to the record. states that the petitioner was never bought out by another company and that she has operated the petitioner under the same Domestic Corporate Charter Number and Federal Employer Identification Number since the restaurant was purchased in 1994. stated that in April 1997, her husband was murdered and that at this point, she did not sell the restaurant. states that the petitioner never underwent a major organizational change. states that the only change when the petitioner reopened for business in the new location, was that she designated her son as the petitioner's secretary to help with the petitioner's paperwork. states that she continues to control and hold 100 percent interest in the petitioner as she did before Hurricane Katrina.

With regard to the consular investigation that alleged that some beneficiaries who were issued their visas either never worked at the restaurant or only worked there briefly, states that this investigation was conducted poorly and she questioned the reliability of the conclusion as the number or identity of the beneficiaries who did not work at the petitioner was not identified. stated that all the beneficiaries who were issued visa to work at the petitioner did in fact work at the petitioner. stated that the eight beneficiaries who were issued immigration, two continue to work at the petitioner and four worked at the petitioner until Hurricane Katrina destroyed the petitioner's physical location. She also claimed that two beneficiaries did leave after only a brief period of employment with the petitioner.

The AAO finds that the petitioner submitted enough documentation to establish that the petitioner is still active in the New Orleans area, and it has not terminated its business. With regard to the DOS statement that the petitioner had to submit a new I-140 petition based on the change in address, the AAO notes that, as counsel claims, both locations are within the same Metropolitan Statistical Area, and thus the prevailing wage to be paid would not be affected by the address change. Since the petitioner did not change with regard to new owners and the petitioner was not bought out or merged into another company, no successor in interest issue exists, and a new I-140 petition does not appear to be necessary.

USCIS computer records do establish that the petitioner has filed at least twelve petitions since 1999.³ The petitions are filed over a range of ten years with the three earliest petitions filed in July 1999. Thus, the AAO does not view this issue as sufficiently detailed to warrant the revocation of the instant petition.

On appeal, counsel states that the petitioner did relocate its business, but the former restaurant location on [REDACTED], and the current location on [REDACTED] are in the same Standard Metropolitan Statistical AREA (SMSSA). Counsel states that a catastrophic act of nature and circumstances beyond the petitioner's control forced the petitioner to put its business on temporary hold, but the petitioner did not terminate its business. Counsel submits copies of the flooding and damages to the petitioner's original business location from Hurricane Katrina; a copy of the petitioner's building permit; copies of the petitioner's Federal Income Tax returns from 2005 to 2008; copies of the petitioner's domestic corporation annual reports for 2005, 2006, and 2007; and copies of the petitioner's business account document from Capital One Bank and Chase bank. Counsel also submitted copies of the petitioner's awards, including an Internet review of the restaurant; an award for [REDACTED] and a magazine article entitled '[REDACTED]

The record of proceeding contains extensive evidence specifically connecting the petitioner's inability to conduct its business following Hurricane Katrina, including pictures of the physical damage and statements from the petitioner stating efforts to rebuild the building in which the petitioner was located prior to the Hurricane prior to its relocation. The record also contains the petitioner's tax returns for tax years 2005, 2006 and 2007 filed prior to and after Hurricane Katrina. While the record reflects a catastrophic impact on the petitioner's business caused by the hurricane, it also reflects that the petitioner continued its business. For this reason, the AAO will withdraw the director's decision with regard to the petitioner's termination of its business. With regard to the consular report's suggestion that the petitioner's prior beneficiaries did not all remain with the petitioner, the AAO would not base a dismissal of the instant petition on this allegation, in particular given the circumstances of the aftermath of Hurricane Katrina on numerous businesses in the New Orleans area, and the twelve year span of time during which the petitioner submitted its I-140 petitions.

Beyond the decision of the director, the AAO will examine the petitioner's ability to pay the proffered position. 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*, 299 F. Supp. 2d 1025,

³ The AAO notes that this number may be inaccurate, as petitions were found under at least two different iterations of the petitioner's name. Further USCIS computer records do not identify the two employees that the petitioner claims began employment with it in 1997 as I-140 beneficiaries for the petitioner. The petitioner's list of employees identifies when the claimed beneficiaries began their employment with the petitioner, while the USCIS computer records list approval dates for I-140 petitions. However, the overall number of beneficiaries is comparable.

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 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. § 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).

Here, the Form ETA 750 was accepted on October 7, 2002. The proffered wage as stated on the Form ETA 750 is \$15.46 per hour (\$32,156 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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 October 22, 1985, to have a gross annual income of \$790,256, net annual income of \$572,658, and to current employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on May 26, 2005, the beneficiary did not claim to have worked for the petitioner.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank 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 will be considered below in determining the petitioner's net current assets.

Further, the petitioner's owner's assets will not be considered in examining the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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 from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill.

1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

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

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The AAO further notes that the petitioner filed a second I-140 petition during the same time period as the beneficiary's [REDACTED] for [REDACTED]. This I-140 petition was received by USCIS on November 28, 2005 and approved on December 9, 2005.⁴ If the beneficiary in this petition was paid the same salary for the same position, the petitioner would have to establish its ability to pay the proffered wages for both beneficiaries.

⁴ The AAO notes that both the instant petition and the second petition were both approved on December 9, 2005 and revoked on August 13, 2009.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 record reflects that Form ETA 750 in the instant matter was accepted by the Department of Labor (DOL) on October 7, 2002, and the proffered wage as stated on the Form ETA 750 is \$15.46 per hour (\$32,156 per year). Based on the tax returns submitted with the I-140 petition, and on appeal, the petitioner's net income was \$20,700 in 2002, \$1,345 in 2003, \$5,546 in 2004; -\$133,598 in 2005; -\$13,137 in 2006, \$57,638 in 2007, and \$14,073 in 2008. The petitioner's net current assets are \$52,062 in 2002; \$89,146 in 2003; \$63,877 in 2004; \$79,904 in 2005; \$75,681 in 2006; \$40,142 in 2007; and \$68,281 in 2008. If both beneficiaries for whom I-140 petitions were filed in 2005 had a similar priority date, and were petitioned for the same position and wages, the petitioner did not have either sufficient net income to pay both beneficiaries in any tax year. The petitioner, however, did have sufficient net current assets to pay both beneficiaries in tax years 2003, 2005, 2006, and 2008.

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.

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

⁵According 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.

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

In the instant case, the AAO notes that the record contains evidence as to the present restaurant operations of the petitioner, including magazine articles and other reviews. Thus, the petitioner's positive profile within the New Orleans restaurant community is established. However, during tax years 2005 to 2007, the petitioner does not appear to have been operating as a restaurant. This period of time includes the time that the instant petition and a second petition were submitted for approval to the USCIS. This fact alone would undermine the petitioner's ability to establish it is a viable business entity from 2002 to the present date. Further, with regard to overall wages paid to its employees, the AAO notes that the Paychex payroll accounts submitted in response to the AAO's NOID indicate that the petitioner paid her employees identified as cooks wages significantly lower than the proffered wage. The petitioner's overall wages for tax years 2002 to 2009 are as follows: \$205,389 in 2002;⁶ \$182,786 in 2003;⁷ \$183,465 in 2004; \$105,092 in 2005; \$0 in 2006; \$0 in 2007; \$127,437 in 2008; and \$110,746 in 2009. This fact raise questions as to whether the petitioner could have paid both beneficiaries for whom the petitioner filed I-140 petitions in 2005 the proffered wage at any time.

Assessing the totality of circumstances, the AAO does not find the petitioner has established its ability to pay the proffered wage as of the priority date and onward.

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

⁶ As reflected on line 3, Schedule A, Cost of labor.

⁷ As reflected on line 13, first page of the return, salaries and wages.

[REDACTED]

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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 director's revocation is withdrawn. The appeal is granted in part; however the AAO will deny the petition on a new ground.