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



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

B6

FILE: [REDACTED] Office: TEXAS SERVICE CENTER
SRC 07 234 50260

Date:
SEP 01 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is [REDACTED]. It seeks to employ the beneficiary¹ permanently in the United States as a cook. 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 (the DOL).² 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, 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)(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 unavailable.

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

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

¹ The beneficiary is also known as [REDACTED] according to the record.

² While not a basis of this decision, the AAO notes that on Form ETA 750, Part B, Item 15, the beneficiary's employment duties as a cook were provided, but the beneficiary's employer's information was left blank. No experience was required by the employer for the offered position. However, the AAO notes that according to the DOL's website <<http://www.bls.gov/oco/ocos331.htm>> accessed on July 23, 2010, for the occupation of cook, the DOL states in pertinent part "When hiring restaurant cooks, employers usually prefer applicants who have training after high school." Further, for the same occupation, the DOL states on another website "These training programs [for the occupation of cook] range from a few months to 2 years or more." See <<http://online.onetcenter.org/link/summary/35-2014.00>> accessed on July 23, 2010. The AAO further notes recruitment attempts to fill the offered position were made "by word-of-mouth" according to the labor certification.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.02 per hour (\$22,921.60 per year).

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).³

Accompanying the petition and labor certification, counsel submitted an explanatory letter dated July 24, 2007; a letter from the petitioner dated May 18, 2007; the petitioner's Certification of Incorporation; a death certificate; four 1099-MISC statements from the petitioner to the beneficiary for the period 2003 through 2006; a Wage and Tax Statement (W-2) from the petitioner to the beneficiary for year 2001; and the petitioner's federal income tax returns (Forms 1120S) for 2001, 2002, 2003, 2004, and 2005.

On March 19, 2008, the director issued a Request for Additional Evidence (RFE) asking the petitioner to submit information regarding the petitioner's ability to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2) for years 2001 and 2002. The director also requested W-2 Statements submitted by the petitioner to the beneficiary for the same years.

Additionally, the director requested the petitioner submit evidence such as unaudited financial statements or an accountant's compilation as long as at least one of the three regulatory required forms of evidence (e.g. copies of annual reports, federal tax returns, or audited financial statements) was submitted in response to the RFE. The director then instructed that the petitioner may demonstrate its ability to pay by demonstrating payment to the beneficiary of a salary equal to or greater than the proffered wage, or by demonstrating the petitioner's net income is equal to or greater than the proffered wage, or by demonstrating the petitioner's net current assets is equal to or greater than the proffered wage.

In response, counsel on April 30, 2008, submitted a legal brief dated April 28, 2008, and the following: the petitioner's federal income tax returns (Forms 1120S) for 2001 and 2002; a Wage and

³ 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).

Tax Statement (W-2) from the petitioner to the beneficiary for year 2002; an affidavit from the petitioner's shareholder's made April 25, 2008; the petitioner's Certification of Incorporation; a death certificate; and the petitioner's shareholder's Form 1040 for 2001 and 2002.⁴

Accompanying the appeal, counsel submitted a letter dated July 2, 2008; a copy of an "AILA InfoNet Doc. No. 04082471" printed from the Internet site <<http://aila.org> ... > accessed on June 18, 2008; and a Wage and Tax Statement (W-2) from the petitioner to the beneficiary for year 2001, as well as documentary evidence already submitted in this case.

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 1971 and to currently employ 20 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 under penalty of perjury on April 3, 2001, the beneficiary did not claim to have worked for the petitioner. However, W-2 Statements and 1099-MISC Statements were submitted by the petitioner for the beneficiary for 2001 through 2005. In a letter dated May 18, 2007, the petitioner stated that the beneficiary was employed by it as a cook since 1998.

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).

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 support of the petition, the petitioner submitted, *inter alia*, W-2 statements purportedly representing wages paid to the beneficiary in 2001 and 2002.

⁴ 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."

However, the record contains inconsistencies pertaining to the identity of the beneficiary. The W-2 statements state that the wages were paid to a person having social security number [REDACTED]. The petitioner did not respond to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, [REDACTED] is the beneficiary's social security number. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the W-2 statements as persuasive evidence of wages paid to the beneficiary in 2001 or 2002. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

Regardless, assuming the W-2 statements were persuasive evidence of wages paid to the beneficiary during those years in question, the petitioner submitted both W-2 statements and 1099-MISC Statements evidencing wages, salary or compensation paid to the beneficiary by the petitioner for the following years:

Tax Year:	The Proffered Wage the Petitioner Must Pay.	Petitioner's Wages Paid to the Beneficiary for Years 2001 to 2006:	The Difference between Proffered Wage and the Wage Paid in Each Year:
2001	\$22,921.60	\$4,900.00	\$18,021.60/\$10,686.69 ⁵
2002	\$22,921.60	\$8,625.00	\$14,296.60
2003	\$22,921.60	\$20,000.00	\$2,921.60
2004	\$22,921.60	\$20,020.00	\$2,901.60
2005	\$22,921.60	\$24,000.00	\$-0.0-
2006	\$22,921.60	\$24,000.00	\$-0.0-

In the instant case, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2005 and 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other

⁵ USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period). The prorated proffered wage in 2001 is \$10,686.69.

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 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.

Counsel stated in a letter dated July 24, 2007, that the petitioner's depreciation expense is evidence of the petitioner's ability to pay. 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 March 19, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate its net income for as shown in the table below.

- In 2001, the Form 1120S stated net income⁶ of \$6,026.00.
- In 2002, the Form 1120S stated net income of \$12,205.00.
- In 2003, the Form 1120S stated net income of \$5,622.00.
- In 2004, the Form 1120S stated net income of \$6,231.00.
- In 2005, the Form 1120S stated net income of \$2,808.00.

Therefore, for the years 2001 and 2002, the petitioner through an examination of wages paid to the beneficiary, and net income, could not 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.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. The petitioner's tax returns demonstrate its end-of-year net current assets for as shown in the table below.

- In 2001, the Form 1120S stated net current assets of <\$25,749.00>.
- In 2002, the Form 1120S stated net current assets of \$9,953.00.
- In 2003, the Form 1120S stated net current assets of \$74,635.00.
- In 2004, the Form 1120S stated net current assets of \$61,951.00.

⁶ 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), and line 17c (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 23, 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, and other adjustments shown on its Schedule K for certain years (otherwise net income stated on line 21 and on Schedule K is the same), the petitioner's net income is found on Schedule K of its tax returns.

⁷According 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 Form 1120S stated net current assets of \$46,348.00.

Therefore, through an examination of its net current assets, or wages paid to the beneficiary, could not pay the proffered wage for years 2001 and 2002.

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 for years 2001 and 2002.

On appeal, counsel asserts that USCIS could prorate the proffered wage for the portion of the year 2001 that occurred after the priority date. USCIS will prorate the proffered wage if the record contains evidence of net income, or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as W-2 statements. The petitioner has submitted such evidence, but even prorating the proffered wage, the petitioner could not pay that wage through an examination of wages paid to the beneficiary, or its net income or net current assets for year 2001.

Additionally, counsel asserts that in 2001, the sole shareholder of the petitioner reputedly "gave a loan to his company in the amount of \$18,799," and to pay the proffered wage the sole shareholder "would have simply increased the amount of the loan." The petitioner made the same contention in his affidavit made April 25, 2008, seven years after the priority date in 2001. It is unclear why the petitioner believes either a loan by a shareholder to his company which would also require the "pay down" of the loan could be evidence of the ability to pay, but, it is clear that shareholder proceeds, or liabilities for that matter, cannot be evidence of the ability to pay by their very nature. 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. A shareholder's loan becomes debt owed to that shareholder by the petitioner and it is not relevant to the ability of the petitioner to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2).

Further, counsel asserts that the sole shareholder could have reduced "some other discretionary expense" in 2001, such as "the account payable balance," which means to defer payment of some of the company's expenses. Since according to the petitioner's corporate tax returns, its income and liabilities are accounted for on an accrual basis, it is unclear how delaying payment of expenses would increase its net income, or net current assets, a sufficient amount to pay the proffered wage in 2001, since expenses were accounted for by the accrual method in the tax returns.⁸

⁸ The petitioner's tax returns were prepared pursuant to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. This office would, in the alternative, have accepted tax returns prepared pursuant to cash convention, if those were the tax returns the petitioner had actually submitted to the IRS. This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns

Additionally, counsel stated that in 2001, the sole shareholder could have “given a bigger loan to the company in 2001,” or “would have used a part of his compensation to pay the offered salary.” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence in the record that the sole shareholder did make a bigger loan to the company or that the sole shareholder used part of his compensation to pay the proffered wage. The difference between the proffered wage and wages paid to the beneficiary in 2001 was \$18,021.60, or considering proration in 2001, is \$10,686.69. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel contends that the proximity of the petitioner's Newark, New Jersey, business location and the events of September 11, 2001, affected adversely the petitioner's business income in 2001. The record of proceeding contains insufficient evidence specifically connecting the petitioner's reputed business decline to the events of September 11, 2001. A mere broad statement by counsel or the petitioner that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO notes that the petitioner's tax return in 2001 stated gross receipts of \$844,172.00, and in 2005 \$872,943.00, a three percent difference between the two years, which does not indicate a significant decrease in the petitioner's business revenues in 2001 (or in the last four months of 2001) from what can be assumed to be a representative year of 2005.

Prior counsel stated in a letter dated July 24, 2007, citing USCIS' Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, that the petitioner's payroll plus “additional cash” for each year is evidence of the petitioner's ability to pay. Counsel has not submitted the petitioner's payroll information other than as summarized in the tax returns submitted. While the tax returns show a consistent history of payroll expense and payment, that may also include independent contractors, the

or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not pursuant to the accountant's adjustments.

information does not establish the petitioner's ability to pay the proffered wage. Wage paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. Counsel's contention is misplaced since payment at a rate less than the proffered wage for 2001 is not proof of the petitioner's ability to pay. See USCIS' Interoffice Memorandum (HQOPRD 90/16.45), *Id.* It is also not proof of the petitioner's ability to pay the proffered wage since the priority date. Further, counsel cites neither regulation nor court decision to support his contention.

Based upon counsel's exhibit submitted in the form of a table, "additional cash" is the total of the petitioner's net income and depreciation. It is clear that counsel is counting depreciation towards the petitioner's ability to pay but he is again counting depreciation and net income together as evidence of the petitioner's ability to pay as "additional cash." Since depreciation is an expense, not an asset on the petitioner's tax return, even assuming for sake of argument that deprecation expense could be used in this manner, since it is a component of net income, clearly this is duplicative of the petitioner's finances.

Counsel also advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

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.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion

designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 1971 and currently employs 20 workers. According to information accessed by the AAO on the Internet, which is not adverse to the petitioner, the petitioner enjoys a good business reputation in its locale. According to the tax returns submitted, the petitioner's gross receipts were steady throughout the five year period.⁹ Other than to assert that the events of 9/11 and the discretionary payments made in 2001 of accounts payable, no explanation was submitted into the record why the business could not pay the proffered wage in 2001 or 2002. No uncharacteristic business expenditures or loss has been demonstrated by the petitioner in 2001 or 2002. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage in 2001 or 2002.

Furthermore, as noted above, the record contains unresolved inconsistencies pertaining to the identify of the beneficiary and the petitioner's claim to have paid W-2 wages to him in 2001 and 2002. The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage in 2001 or 2002.

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.

⁹ In 2001-\$844,172.00; 2002-\$929,567.00; 2003-\$894,741.00; 2004-\$879,121.00; and 2005-\$872,943.00