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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  
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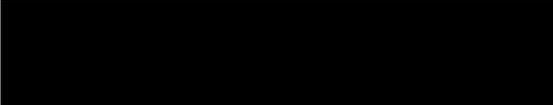
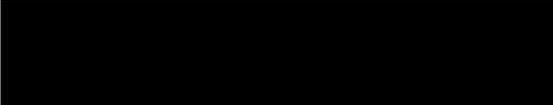
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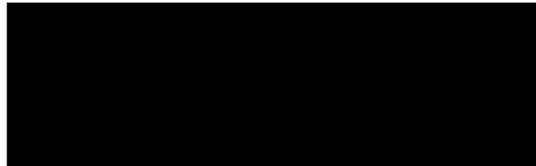
FILE:  Office: NEBRASKA SERVICE CENTER

JAN 03 2011  
Date:

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 \$630. 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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, and all other I-140 beneficiaries, the proffered wage beginning on the 2005 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 April 30, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the beneficiary's proffered wage and the proffered wages of the petitioner's other I-140 beneficiaries 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.

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 ETA Form 9089, Application for Permanent 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

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<sup>1</sup> The petitioner's I-140 petition provides this description. The petitioner's bank accounts and Schedules K also identify the petitioner as doing business as FlashCard Corporation.

had the qualifications stated on its ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on December 30, 2005. The proffered wage as stated on the ETA Form 9089 is \$53,934 per year. The ETA Form 9089 states that the position requires a bachelor's degree in computer science, engineering or a related field and 24 months in the proffered position or in the related position of software engineer and associate software engineer.

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.<sup>2</sup>

On appeal, counsel resubmits the petitioner's 2005 Form 1120S, U.S. Tax Return for an S Corporation. He also submits for the first time the petitioner's 2007 Form 1120S, and a revised Form 1120S for tax year 2006. Counsel also submits copies of pay statements for previously filed I-140 beneficiaries; a corrected list of the petitioner's filed I-140 petitions that includes a withdrawal letter for [REDACTED] copies of the beneficiary's and two other employees' W-2 Forms for 2006 and 2007,<sup>3</sup> and a graph that lists the petitioner's four I-140 beneficiaries, their priority dates, jobs offered, proffered wages, and wages paid in 2007.<sup>4</sup> Counsel states that this graph summarizes all the evidence that the petitioner is able to pay the proffered wage of all I-140 beneficiaries. Other evidence found in the record includes the petitioner's quarterly payroll statements for tax years 2005 and 2006.<sup>5</sup> The record also contains the petitioner's initial Form 1120S for tax year 2006 submitted

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> The petitioner also provides copies of W-2 Forms for [REDACTED]. The AAO notes that the petitioner provided an earlier graph with its response to the director's RFE dated March 14, 2008 that listed five I-140 beneficiaries, including [REDACTED] as an I-140 beneficiary.

<sup>4</sup> The AAO notes that more probative evidence as to the information contained on this graph would be the Forms I-797 acknowledging receipts or approvals of submitted petitions. However, it will comment on this graph. The document also indicates that a petition for [REDACTED] with a 2005 priority date was withdrawn, and also indicates that the petitioner did not file an I-140 petition for [REDACTED]. The I-140 beneficiaries are identified as- the beneficiary, [REDACTED]

<sup>5</sup> The record is not clear as to why the petitioner submitted these quarterly reports since the petitioner also submitted W-2 Forms for both the beneficiary and other I-140 beneficiaries. The W-2 Forms are more probative evidence. If the quarterly reports identify all the petitioner's employees, these documents reflect that the petitioner's number of employees fluctuated. In April 2005, the petitioner identifies three employees, while in December 2006, the petitioner lists nine wage earners. The record is also not clear if the petitioner is indicating the employees listed are beneficiaries of I-

in response to the director's RFE, and the petitioner's January to December 2007 bank statements and January to March 2008 bank statements from Bank of America.

On appeal, counsel submits an interoffice memorandum written by [REDACTED] with regard to the ability to pay, and notes that this memo does not mention establishing the ability to pay the proffered wages of all beneficiaries. Counsel also states that the director erred in not relying on the petitioner's bank statements, and its unaudited financial statements when the petitioner's 2007 tax return was not available.

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 1993 and to currently employ 13 workers. On the ETA Form 9089, the petitioner states that it was established in 2002 and has two employees. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on May 29, 2006, the beneficiary claimed that he had worked for the petitioner since April 27, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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).

On appeal, counsel states that the director erred in not considering the petitioner's bank statements. Counsel makes no further assertions with regard to this issue in his brief. As previously stated by the director, 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

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140 or I-129 petitions. If the petitioner was attempting to provide a complete record of wages paid to all employees, the Form 941-Quarterly Employer's Federal Tax Return, is more probative.

<sup>6</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Finally the AAO notes that the 2007 and 2008 bank statements submitted to the record were for the petitioner doing business as [REDACTED] at two different addresses in either Houston or Spring, Texas. The record does not reflect the relationship between the petitioner and [REDACTED] and why the petitioner would submit these statements to the record.

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. The petitioner submitted the beneficiary's W-2 Forms for tax years 2006 and 2007 that indicated it paid the beneficiary \$51,060 in 2006 and \$43,634.54 in 2007. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2005 or subsequently. Thus, the petitioner must demonstrate that it can pay the entire proffered wage in tax year 2005,<sup>7</sup> the priority date year, and the difference between wages actually paid to the beneficiary and the proffered wage in 2006 and 2007.<sup>8</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (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

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<sup>7</sup> Since the beneficiary indicated on the ETA Form 9089 that he had worked for the petitioner since 2004, the record is not clear why the petitioner provided no W-2 Form for tax year 2005.

<sup>8</sup> The difference between the beneficiary's actual wage and the proffered wage of \$53,934 is \$2,874 in 2006 and \$10,299.46 in 2007.

expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (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 118. “[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 April 28, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was due; however, the petitioner did not submit it, providing a Form 7004, requesting an extension of time to file the return. On appeal, the petitioner submits its 2007 tax return to the record. Therefore, the petitioner’s income tax return for 2007 is the most recent return available.

The AAO notes that on appeal the petitioner submits a revised 2006 tax return.<sup>9</sup> However, the record does not indicate that the petitioner submitted the revised tax return to IRS or that IRS accepted the revised return. Thus, the petitioner submits unofficial tax return revisions to the record. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner’s proposed changes to its 2006 tax return constitute material changes with regard to the analysis of the petitioner’s ability to pay the proffered wage. A petitioner may not make material

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<sup>9</sup> The AAO notes that the petitioner revised its 2006 net income by reducing its deductions identified on line 20 of its Form 1120S.

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).

Therefore the AAO will examine the petitioner's 2005 and 2006 tax return submitted to the record prior to the director's decision, and the petitioner's 2007 tax return submitted on appeal. The petitioner's tax returns demonstrate its net income for these years as shown in the table below.

- In 2005, the Form 1120S stated net income<sup>10</sup> of \$94,363.
- In 2006, the Form 1120S stated net income of \$0.
- In 2007, the Form 1120S stated net income of \$174,531.

For the years 2005 and 2007, the petitioner has sufficient net income to pay the entire proffered wage in 2005, and to pay the difference between the beneficiary's actual wages and the proffered wage in these two years. It has not demonstrated that it had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2006. Further as the director stated, the petitioner has to establish its ability to pay the proffered wages of additional beneficiaries of pending petitions.<sup>11</sup> As the petitioner noted, the [REDACTED] memo does not reference this issue.

Even if the [REDACTED] examined this issue, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Lou-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines

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<sup>10</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) 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> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for any relevant year, the petitioner's net income is found on line 21 of page one of the Form 1120S.

<sup>11</sup> While the director examined the proffered wages of the I-140 beneficiaries listed on the petitioner's graph, the AAO would examine the proffered wages of both the I-140 beneficiaries and the I-290 beneficiaries in its analysis of the petitioner's ability to pay the proffered wage.

“neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”)

In examining the realistic nature of the job offer, the AAO examines both pending petitions for the I-140 beneficiaries and H-1B beneficiaries to establish the petitioner’s ability to pay. USCIS records indicate that the petitioner, identified as [REDACTED] has filed 19<sup>12</sup> petitions with receipts dates from 2004 to 2010. These petitions include 16 I-129 petitions, and three I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Thus, even though counsel on appeal states that the petitioner did not file an I-140 petition for [REDACTED] USCIS records indicate that the petitioner filed another I-129 petition for [REDACTED], approved on February 21, 2008. Thus the petitioner would have to establish its ability to also pay the proffered wage of [REDACTED] as a I-129 beneficiary, during tax year 2008 and onward. [REDACTED] proffered salary as a I-129 beneficiary is identified as \$43,000 in USCIS record and as a I-140 beneficiary his proffered wage was identified as \$75,000 on the petitioner’s graph submitted on appeal.

In his decision, the director stated that the combined wages of all the petitioner’s I-140 beneficiaries totaled \$309,020 each relevant year, and that the petitioner’s five beneficiaries were paid \$118,823.14 in 2007. The director noted that the petitioner would have had to have paid \$180,196.86 in additional revenue in 2007 to pay both the proffered wage to the beneficiary and the proffered wages of other I-140 beneficiaries. While the director’s analysis is accurate with regard to the information provided by the petitioner, the actual net income required to establish the petitioner’s ability to pay would only rise if the proffered wages of both I-140 beneficiaries and I-290 beneficiaries with pending applications in 2005 through 2007 were considered.

Further, based on the petitioner’s net income in tax year 2006 of zero (0), it does not appear that the petitioner could pay the difference between the beneficiary’s actual wages and his proffered wage, and the difference between the remaining beneficiaries’ actual wages and their proffered wages.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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

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<sup>12</sup> The AAO notes that this number may be higher. One website viewed by the AAO stated that [REDACTED] located in Houston, Texas, had filed 41 H-1B petitions. *See* <http://myvisajobs.com/visasponsor/lingtech/322143-Occupation.htm>. (Available as of December 10, 2010.)

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.<sup>13</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for these relevant years, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$1,989.
- In 2006, the original Form 1120S stated net current assets of -\$13,925.
- In 2007, the Form 1120S stated net current assets of \$9,968.

Therefore, for the years 2005 to 2007, the petitioner did not had sufficient net current assets to pay the difference between the beneficiary's actual wages in 2005, or the difference between the beneficiary's actual wages and the proffered wage in tax years 2006 or 2007.<sup>14</sup> Further, the petitioner did not have sufficient net current assets to pay the difference between all the I-140 and I-129 beneficiaries' actual wages and proffered wages in the relevant period of time.

Therefore, from the date the ETA Form 9089 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.

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 ETA Form 9089 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 (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

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<sup>13</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>14</sup> As previously stated, the difference between the beneficiary's actual wages and the proffered wage in 2007 is \$10,299.46.

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 record is not clear as to whether the petitioner was established in 1993 or 2002. The USCIS computer records reflect that the petitioner as [REDACTED] began filing immigration petitions in 2004. Based on the petitioner's tax returns, it paid its officers \$25,000 in 2005; \$24,000 in 2006; and zero (0) in 2007. The record is devoid of further documentation on the petitioner's business operations, although the petitioner's bank statements and Schedule Ks reflect that it does business as [REDACTED]. The petitioner's tax returns indicate gross profits as follows: in 2005, \$707,819; in 2006, \$911,926; and in 2007, \$1,079,681. With regard to wages and salaries, the record reflects the following: in 2005 wages of \$335,565; in 2006, \$574,133; and in 2007, \$613,948.

In providing more information on the petitioner, counsel has focused exclusively on the I-140 beneficiaries, and provided no further documentation on the overall number of employees, or the petitioner's business operations, among other issues. Further on appeal counsel appears to revise evidence submitted to the record previously rather than providing substantive evidence to further support the instant petition. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

The 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.

