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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



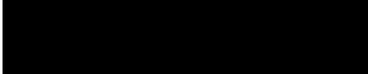
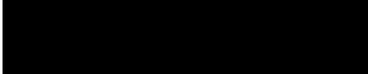
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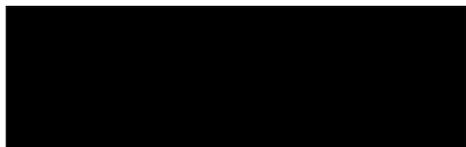
B6

FILE:  Office: NEBRASKA SERVICE CENTER Date: JAN 11 2011

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,

*Elizabeth McCormack*

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 designs and sells healthcare software. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage during the qualifying period, specifically in 2003. The director also found that the petitioner failed to pay the proffered wage in 2003.

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 17, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. In addition, section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 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).<sup>1</sup>

Here, the Form ETA 750 was filed and accepted for processing by the DOL on July 24, 2003. The rate of pay or the proffered wage stated on that form is \$27.62 per hour or \$57,449.60 per year.

Therefore, to qualify for the preference visa under section 203(b)(3) of the Act, the petitioner must show that it has the ability to pay \$27.62 per hour or \$57,449.60 per year beginning on July 24, 2003 and continuing until the beneficiary obtains lawful permanent residence. The petitioner submitted copies of the following evidence to demonstrate that ability:

- Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income, for the years 2002 through 2006;
- The beneficiary's Forms W-2 issued by the petitioner from 2003 to 2006;
- The beneficiary's paystubs for various pay periods in 2007;
- The beneficiary's Form 1099-MISC issued by the petitioner in 2003;
- A letter dated April 24, 2007 from the president of the organization, [REDACTED] stating that the beneficiary has been employed by the petitioner since February 2, 2003 and is currently paid \$78,000 annually;
- A letter dated March 19, 2008 from [REDACTED] attesting to his organization's ability to pay the proffered wage;
- A letter dated March 25, 2008 from the petitioner's tax preparer, [REDACTED] who states that the petitioner received the following capital contributions from 2002 to 2005: \$1,906,000 in 2002 (tax year beginning January 1, 2002 and ending September 30, 2002); \$2,502,500 in 2003 (tax year beginning October 1, 2002 and ending September 30, 2003); \$1,986,019 in 2004 (tax year beginning October 1, 2003 and ending September 30, 2004); and \$1,276,300 in 2005 (tax year beginning October 1, 2004 and ending September 30, 2005);
- A letter dated March 25, 2008 from [REDACTED] analyzing the beneficiary's wage based on fiscal year and stating that the cash contribution regularly received by the petitioner from 2001 should be considered as part of the petitioner's ability to pay;

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<sup>1</sup> The proffered position, according to the Form ETA 750, requires an application to have a minimum of a bachelor's degree in computer science, engineering, or mathematics and two years work experience in the job offered or four years experience as a computer programmer on or before the priority date. The director had determined in his decision that the beneficiary possessed the minimal education and work experience needed to perform the duties of the proffered position before July 24, 2003. We agree with the director and thus will not elaborate further on this issue.

- A letter dated March 27, 2008 from [REDACTED], stating that the petitioner had an average balance of \$74,977.95 in its bank account during the 2003 calendar year; and
- The petitioner's bank statements for 2003.

The evidence in the record of proceeding shows that the petitioner is structured as a multi-member limited liability corporation (LLC) partnership. On the petition, the petitioner claimed to have been established in 1995<sup>2</sup> and to currently employ 42 workers. From 2002 to 2005, the petitioner's tax year began on October 1 and ended on September 30. In 2006, the petitioner changed its tax year to a calendar year.

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>3</sup>

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

In 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.

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<sup>2</sup> A search of the Connecticut Secretary of State's website reveals that [REDACTED]

LLC.

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

On part B of the Form ETA 750, signed by the beneficiary on July 21, 2003, the beneficiary indicated that he had worked for the petitioner since February 2003. In support of the beneficiary's application to register permanent residence or adjust status (Form I-485), Dr. [REDACTED] the petitioning organization's president, wrote a letter on April 24, 2007 indicating that the petitioner had employed the beneficiary since February 2, 2003. The record includes a copy of the beneficiary's initial H-1B visa approval to work for the petitioner, valid from February 1, 2003 to March 29, 2004.

A review of the evidence submitted reveals the following information:

- In 2003, the beneficiary received a total of \$42,998.72 (\$14,450.88 less than the proffered wage).<sup>4</sup>
- In 2004, the beneficiary received \$61,268.99 (\$3,819.39 more than the proffered wage).
- In 2005, the beneficiary received \$59,589.11 (\$2,139.51 more than the proffered wage).
- In 2006, the beneficiary received \$69,412.50 (\$11,962.90 more than the proffered wage).
- In 2007, the beneficiary received \$3,072.36 every two-week pay period and as of July 7, 2007, had received \$43,013.04 ([REDACTED] states in his April 24, 2007 letter that the beneficiary's annual salary is currently \$78,000).

Therefore, other than 2003, the petitioner has shown that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary receives permanent residence.

On appeal, [REDACTED] CPA, MBA, contends that the beneficiary's pay in 2003 should be prorated since the priority date fell on July 24, 2003. [REDACTED] states that had the beneficiary's proffered pay been prorated from the priority date, the beneficiary would have made \$17,657.76 more than the proffered wage.<sup>5</sup>

We generally will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. The AAO will only 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 monthly income or pay stubs.

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<sup>4</sup> In 2003, the beneficiary received \$9,768 as a non employee (independent contractor) and \$33,230.72 as an employee.

<sup>5</sup> The beneficiary's prorated wage, according to [REDACTED] is \$25,340.96 (\$57,450 divided by 365 days and multiplied by 161 days – that is the number of days between July 24, 2003 and December 31, 2003). The beneficiary was actually paid \$42,998.72 in 2003, \$17,657.76 more than the amount [REDACTED] states as the prorated wage (\$25,340.96).

Based on the evidence submitted (*i.e.* copy of the H1B visa approval, [REDACTED] letter dated April 24, 2007, and the beneficiary's application to register permanent residence or adjust status), the beneficiary appears to have been employed and paid by the petitioner from February 2, 2003, more than five months before the priority date. Even were we prorate the beneficiary's proffered wage, the beneficiary would have received \$9,256.81 less than the proffered wage in 2003.<sup>6</sup>

[REDACTED] also indicates a problem in calculating the beneficiary's pay when the petitioner's tax reporting period is based on a fiscal year (beginning on October 1 and ending on September 30). [REDACTED] claims that the beneficiary *actually* received \$59,186.49 in fiscal year (FY) 2003 if the beneficiary's pay were calculated by using a fiscal-year method.<sup>7</sup>

We find that this method is flawed. The beneficiary started his employment on February 2, 2003 during the fiscal year beginning on October 1, 2002. Mr. [REDACTED] calculation started on October 1, 2003 – the beginning date of the petitioner's next fiscal year – and does not demonstrate that the beneficiary earned at or more than the proffered wage during his first partial fiscal year of employment with the petitioner (from February 2, 2003 to September 30, 2003).

Thus, in order to meet its burden of proving by a preponderance of the evidence that the petitioner has the ability to pay the proffered wage, the petitioner must be able to pay the difference between the proffered wage and the beneficiary's actual pay in 2003 or \$14,450.88. The petitioner can pay this amount through its net income or net current assets.

If the petitioner chooses to pay \$14,450.88 through its net income, USCIS will 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 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.

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<sup>6</sup> The beneficiary's prorated wage would be \$52,255.53 (\$57,449.60 divided by 365 days and multiplied by 332 days – that is the number of days between February 2, 2003 and December 31, 2003). The beneficiary was actually paid \$42,998.72 in 2003 (from February 2, 2003 to December 31, 2003). Thus \$42,998.72 is \$9,256.81 less than \$52,255.53.

<sup>7</sup> This method basically takes the prorated amount paid to the beneficiary from October 1, 2003 to December 31, 2003 and adds that to the prorated amount paid to the beneficiary from January 1, 2004 to September 30, 2004.

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. 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).

For a partnership, where the member's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, since the petitioner's Schedule K has relevant entries for additional income and deductions in FY 2002 and FY 2003, its net income is, therefore, found on line 1 of the Analysis of Net Income (Loss) of the Schedules K. The petitioner's tax returns demonstrate its net income for the fiscal years (FY) 2002 and 2003, as shown in the table below.

- In FY 2002 (from October 1, 2002 to September 30, 2003), the Form 1065 stated net income (loss) of (\$698,419) (line 1, Schedule K).
- In FY 2003 (from October 1, 2003 to September 30, 2004), the Form 1065 stated net income (loss) of (\$2,176,709) (line 1, Schedule K).

Therefore, the petitioner's net income in either FY 2002 or 2003 is not sufficient to cover the difference between the beneficiary's actual pay and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> The partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets (liabilities) as detailed in the table below.

- In FY 2002, the petitioner's Form 1065 stated net current assets (liabilities) of (\$46,388).
- In FY 2003, the petitioner's Form 1065 stated net current assets (liabilities) of (\$340).

Based on the table above, the petitioner does not have sufficient net assets to pay the rest of the beneficiary's wage in 2003.

On appeal, both [REDACTED] and [REDACTED] contend that the director should have considered the amount available in the petitioner's bank statements as evidence of the petitioner's ability to pay. In his letter, [REDACTED] stated that in 2003, the petitioner's bank account averaged \$74,977.95, which was more than sufficient to cover the rest of the beneficiary's wage.

As the director has stated earlier, the petitioner's reliance on the balances in the bank accounts is misplaced. Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept or the petitioner to submit additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for

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<sup>8</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.

FY 2002 through FY 2006. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns or in the cash entry on Schedule L. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay.

On appeal, [REDACTED] both indicate that the petitioning organization has consistently received substantial amounts of "capital contributions" since 2002. [REDACTED] the petitioner's tax preparer, in her March 25, 2008, gave the following information concerning the amounts of the capital contributions that the petitioner received between 2002 and 2005:

- \$1,906,000 in 2002 (tax year beginning January 1, 2002 and ending September 30, 2002);
- \$2,502,500 in 2003 (tax year beginning October 1, 2002 and ending September 30, 2003);
- \$1,986,019 in 2004 (tax year beginning October 1, 2003 and ending September 30, 2004); and
- \$1,276,300 in 2005 (tax year beginning October 1, 2004 and ending September 30, 2005);

We note that the petitioner reported these capital contributions on its tax returns on line 2 of schedule M-2, Analysis of Partner's Capital Accounts, and on line 21 of schedule L as partner's capital accounts. Partner's capital accounts are neither assets nor liabilities. They represent the amount of investment – cash in this case – that the partner or partners contribute to the partnership to ensure that the business is adequately financed and does not face bankruptcy.

A close review of the petitioner's tax returns reveals that the petitioner has had substantial net loss since FY 2002. The following information details the net loss of the partnership:

- The net income (loss) in FY 2002 is (\$698,419) (line 1, schedule K).
- The net income (loss) in FY 2003 is (\$2,176,709) (line 1, schedule K).
- The net income (loss) in FY 2004 is (\$1,175,379) (line 1, schedule K).
- The net income (loss) in FY 2005 is (\$574,822) (line 1, schedule K).
- The net income (loss) in FY 2006 (October 1 – December 6)<sup>9</sup> is (\$122,992) (line 1, schedule K).

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<sup>9</sup> The petitioner's accountant, Mr. [REDACTED] in his letter dated July 24, 2007 states:

On December 6, 2006 more than 50% of the Company changed hands requiring [REDACTED] to file another tax return as of that date (an IRS rule for majority sale of LLC's). In addition, [REDACTED] management and ownership decided to change from a fiscal year tax filing status to a calendar year tax filing status thus another tax return was needed to be filed as of December 31, 2006 for the tax year

- The net income (loss) in FY 2006 (December 6 – December 31) is (\$191,703) (line 1, schedule K).

Based on the finding above, it is unlikely that that the multi-member LLC partnership will survive *unless* the partners infuse substantial amount of new investment (cash, in this case) into the business. The AAO, however, will not augment the petitioner's net income or net current assets by adding in the capital contributions. While Dr. [REDACTED] in his March 19, 2008 letter states that the partnership received \$6,551,919 in capital contributions from January 1, 2002 to December 31, 2004 and \$2,332,619 from January 1, 2003 to January 1, 2004, the tax returns in the record do not show that these amounts in capital contributions were readily available as net current assets. Once received, the petitioner must have recorded the capital contributions in its balance sheets (reflected on schedule L of the Form 1065 tax return). In this case, when the petitioner received money from one or more of its partners, the petitioner would have credited the amount received in its capital account. A review of the petitioner's Form 1065, schedule L does not reflect that the petitioner had large net current assets in either FY 2002 or FY 2003 sufficient to pay the beneficiary's wage. Nor does it show that the petitioner had sufficient net current assets to pay the proffered wage in any of the years during the qualifying period. Therefore, it is not appropriate to consider these capital contributions as evidence of the petitioner's ability to pay.

An LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.<sup>10</sup> An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. Thus, the AAO may not consider the assets of the partners and any promise of additional capital contributions to pay the proffered wage of the beneficiary.

Further, 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

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of 2006.

<sup>10</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1995. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments. Similarly, the evidence submitted does not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage particularly in 2003.

In a motion to reopen the director's denial earlier, counsel claimed that the petitioner's ability to pay has already been established through approval by USCIS of other similar cases.

We cannot comment on other petitions filed by the petitioner as the facts and evidence presented in those cases are different from this one. Further, the director's decision does not indicate whether he reviewed the prior approval of the other immigrant petitions. If the previous immigrant petitions were approved based on the same assertions that are contained in the current record, the approval would constitute error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In addition, although not raised by the director, we note that USCIS records indicate that the petitioner has filed 17 (seventeen) petitions since the petitioner's establishment in 1995, including 13 (thirteen) I-129 petitions, and 4 (four) 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. Based on the evidence submitted, we are not persuaded that the petitioner has the continuing ability to pay the proffered wage of the beneficiary. The petition cannot be granted for this additional reason.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, we find that the petitioner does not have the ability to pay the salary offered from the priority date, specifically in 2003. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.