

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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



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

**PUBLIC COPY**

B6

FILE:

Office: TEXAS SERVICE CENTER Date:

MAR 23 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. 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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the Director, Texas Service Center, served the petitioner with notice of intent to revoke the approval of the petition (NOIR).<sup>1</sup> In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

The petitioner is a gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as a day manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petition had been approved in error as 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 revoked the previously approved 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 notice of revocation, the 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.

---

<sup>1</sup> The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out such evidence did not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage since the priority date of February 8, 2002, and thus was properly issued for good and sufficient cause.

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).

Here, the Form ETA 750 was accepted on February 8, 2002. The proffered wage as stated on the Form ETA 750 is \$45,074.00 per year. The position requires two year of experience in the job offered.

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 asserts that the director failed to consider the totality of the circumstances to determine the petitioner's ability to pay the proffered wage. Counsel argues that the petitioner's retained earnings, net income before depreciation, bank accounts, as well as the willingness of the petitioner's sole owner to forego compensation and use his own personal assets demonstrate that the petitioner has the continued ability to pay the beneficiary the proffered wage. Counsel submits copies of the petitioner's bank statements for three accounts for the month of December 2008, a copy of Form IT-201, New York State Resident Income Tax Return, of the petitioner's owner for 2002, and a copy of Form 1040, U.S. Individual Income Tax Return, of the petitioner's owner for 2003.

Relevant evidence in the record also includes the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner's owner's Form 1040 tax return for 2004, and a copy of a separate petition, EAC 05 243 52683, filed

---

<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 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 behalf of a different beneficiary by the petitioner on September 8, 2005 as well as the corresponding Form ETA 750 with a priority date of February 8, 2002 and a stated proffered salary [REDACTED] year.

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 2001 [REDACTED] gross annual income, and currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year corresponds to the calendar year. The Form ETA 750B, signed by the beneficiary on August 16, 2005, does not indicate that the beneficiary worked for the petitioner.<sup>3</sup>

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, 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

---

<sup>3</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. The DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, the DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). The DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). The DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750. Memo. from [REDACTED] Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

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 the instant case, the record contains no evidence demonstrating that the beneficiary has worked for the petitioner in the period subsequent to the priority date of February 8, 2002. Accordingly, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (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 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 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 June 5, 2009 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to revoke (NOIR). Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's Form 1120S tax returns demonstrate its net income for the years 2002, 2003, 2004, 2005, 2006, 2007, and 2008 as shown in the table below.

- In 2002, line 21 of the Form 1120S stated net
- In 2003, line 21 of the Form 1120S stated net
- In 2004, Schedule K of the Form 1120S stated
- In 2005, Schedule K of the Form 1120S stated
- In 2006, Schedule K of the Form 1120S stated
- In 2007, Schedule K of the Form 1120S stated
- In 2008, Schedule K of the Form 1120S stated

---

<sup>4</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), or line 18 (2006-2008) of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on March 17, 2011) (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 2002 and 2003, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S in those respective years. Because the petitioner did have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2004 through 2008, the petitioner's net income is found on Schedule K of its 2004, 2005, 2006, 2007, and 2008 tax returns.

As previously discussed, the record contains a copy of a separate petition, EAC 05 243 52683, filed on behalf of a different beneficiary by the petitioner on September 8, 2005 as well as the corresponding Form ETA 750 with a priority date of February 8, 2002 and a proffered salary of [REDACTED] year. The record shows that the petition, EAC 05 243 52683, was approved by USCIS on October 8, 2005. The petitioner must establish the ability to pay both the beneficiary in the instant case the proffered salary of [REDACTED] per year since the priority date of February 8, 2002 and the beneficiary of the separate petition, EAC 05 243 52683, the proffered salary of [REDACTED] from the priority date of February 8, 2002 through the date the beneficiary of the separate petition adjusts to permanent residence. According to USCIS electronic records, the beneficiary of EAC 05 243 52683 has not yet adjusted to permanent resident status. Thus, the petitioner must establish the ability to pay combined proffered salaries of [REDACTED] to the present. The petitioner failed to demonstrate that it had sufficient net income to pay the combined proffered salaries [REDACTED] of both the beneficiary in the instant case and the beneficiary of the separate petition, EAC 05 243 52683, in 2002, 2003, 2004, and 2005, 2006, and 2008.

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>5</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 2002, 2003, 2004, 2005, 2006, 2007, and 2008 as shown in the table below.

- In 2002, the Form 1120S stated net current [REDACTED]
- In 2003, the Form 1120S stated net current [REDACTED]
- In 2004, the Form 1120S stated net current [REDACTED]
- In 2005, the Form 1120S stated net current [REDACTED]
- In 2006, the Form 1120S stated net current [REDACTED]
- In 2007, the Form 1120S stated net current [REDACTED]
- In 2008, the Form 1120S stated net current [REDACTED]

As previously noted, the petitioner must establish the ability to pay combined proffered salaries of [REDACTED] to the present. The petitioner did not have sufficient net current assets to pay the combined proffered salaries of [REDACTED], 2004, 2007, and 2008. Therefore, the

<sup>5</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.

petitioner did not have sufficient net income or net assets to pay the combined proffered salaries in 2002, 2003, 2004, and 2008. It is noted that, even considering only the instant beneficiary's proffered wage [REDACTED] petitioner did not establish sufficient net income or net current assets in 2003 to pay the beneficiary alone the proffered wage.

On appeal, counsel contends that the petitioner's retained earnings represented funds that were available to pay the proffered wage to the beneficiary since the priority date. However, retained earnings are a company's accumulated earnings since its inception less dividends. *Barron's Dictionary of Accounting Terms* 378 (3<sup>rd</sup> ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings. Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. *Id.* Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. *Id.* at 27. The record does not demonstrate that the petitioner's retained earnings are truly unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111. Therefore, the AAO will not consider the petitioner's depreciation when evaluating its continuing ability to pay the proffered wage to the beneficiary.

Counsel states that the petitioner's accounting and tax planning strategies resulted in a net income figure that does not accurately reflect the petitioner's annual cash flow. Counsel claims that the

director should consider the totality of the circumstances, including accounting practices<sup>6</sup>, when making determinations of the petitioner's ability to pay the proffered wage. Counsel notes that this reasoning was utilized by the seventh circuit court of appeals in a recently issued decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7<sup>th</sup> Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage.

The court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *Id.* at 596. The court stated that if an employer has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure. *Id.* at 595.

Therefore, if the AAO were to follow the holding of the court in *Construction and Design* in the instant case, the petitioner would be required to establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by approximately 1.4. The multiplier is based on data provided by the Bureau of Labor Statistics, which is available at <http://www.bls.gov/news.release/ecec.t01.htm> (accessed February 3, 2011). Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to \$63,103.60 per year. However, as the instant case does not arise in the seventh circuit, the AAO will not require the petitioner to establish its continuing ability to pay the proffered wage at the higher "fully burdened" wage rate.

---

<sup>6</sup> Counsel has not made any specific references or contentions concerning the petitioner's accounting practices.

Counsel asserts that assets such as cash contained in the petitioner's bank accounts provide the petitioner with the ability to pay the proffered wage since the priority date. The record contains copies of the petitioner's bank statements for the month of December 2008 from Bank of America for three separate checking accounts with an average balance of [REDACTED] and [REDACTED] respectively for this month. Regardless, the petitioner's accounts with Bank of America represent cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than readily available assets that could be used to continually pay the proffered wage to the beneficiary since the priority date. Overall, these bank statements do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date and counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, as explained above, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered when determining the petitioner's net current assets. Therefore, the AAO will not consider the petitioner's bank statements when evaluating the petitioner's continuing ability to pay the proffered wage to the beneficiary.

In the instant case, the record contains no evidence demonstrating that the petitioner has paid the beneficiary the proffered wage [REDACTED] since the priority date. In addition, the petitioner failed to demonstrate that it had sufficient net income to pay the combined proffered salaries of [REDACTED] of both the beneficiary in the instant case and the beneficiary of the separate petition, EAC 05 243 52683, in 2002, 2003, 2004, and 2008.

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 Sonegawa*, 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about [REDACTED]. 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 [REDACTED] 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. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Although counsel claims that the petitioner's owner is willing and able to sacrifice and forego past, present, or future compensation to pay the beneficiary's proffered wage, the record contains no direct evidence from the petitioner's owner to support this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

Even if the record contained direct evidence of the petitioner's sole owner's willingness to forego compensation and use his own personal assets to pay the beneficiary the proffered wage, the personal assets of petitioner's owner may not be used to establish the petitioning corporation's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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."

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 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.