



U.S. Citizenship  
and Immigration  
Services

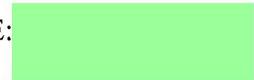
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DATE: AUG 06 2012

OFFICE: NEBRASKA SERVICE CENTER

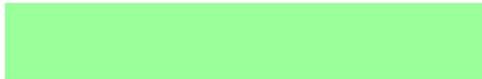
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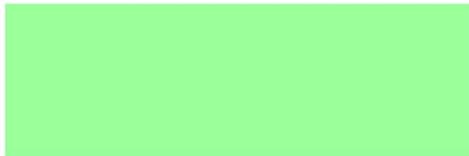
Petitioner:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting and decorating company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 6, 2009 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.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

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Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$660 per week (\$34,320 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or in the related occupation of carpentry.

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>1</sup>

On appeal, counsel submits a brief; copies of the depreciation reports which accompany the petitioner's U.S. Income Tax Return for an S Corporation for 2001, 2003, 2004 and 2005; a copy of an asset detail report for 2007; a copy of one page of Form 4562 which accompanies a federal tax return for 2008; copies of deposit tickets bearing the name of the beneficiary for 2004, 2005, 2006, 2007, 2008 and 2009; copies of checks drafted by [REDACTED] from a personal account and made payable to the beneficiary for 2005, 2006, 2007; a copy of a check drafted by [REDACTED] from a personal account to the beneficiary for June 2007; copies of two checks drafted by the petitioner to the beneficiary in March and April 2008; and a copy of the beneficiary's U.S. Individual Income Tax Return (Form 1040) for 2008.

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 1995 and currently to employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on August 5, 2002, the beneficiary claimed to be working for the petitioner but does not identify the date on which he began working for the petitioner.<sup>2</sup>

On appeal, counsel asserts that the director erred in his determination because he did not consider the totality of the petitioner's financial circumstances. Counsel also asserts that United States Citizenship and Immigration Services (USCIS) should have added the petitioner's deduction for depreciation to the net income. Counsel also asserts that the petitioner owns a fleet of vehicles which could be sold to pay the beneficiary. Further, counsel asserts that the petitioner has a building which could be used to pay the beneficiary. Lastly, counsel asserts that, on appeal, counsel has provided evidence of wages paid to the beneficiary from 2004 through the date of the filing of the instant appeal.

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

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<sup>1</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>2</sup> On Form G-325A, Biographic Information, which the beneficiary submitted with his Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary claims to have worked for the petitioner since 2000.

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'l Comm'r 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 the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

With its initial petition submission, as evidence of its ability to pay, the petitioner provided its U.S. Income Tax Return for an S Corporation (Form 1120S) for 2001 only. The petitioner provided no other forms of evidence in support of its ability to pay and no evidence demonstrating that it had ever paid the beneficiary any wages at any time. On February 6, 2009, the director issued a request for evidence (RFE), noting that the petitioner's tax return for 2001 did not demonstrate the ability to pay the beneficiary the proffered wage, through a consideration of either the petitioner's net income or net current assets. The director, therefore, asked the petitioner to provide evidence of wages paid to the beneficiary between the years 2001 and 2008, in the form of either IRS Form W2 or IRS Form 1099, and tax returns for any years in which the petitioner failed to pay the beneficiary the full proffered wage. In its response, the petitioner provided a copy of the IRS Form W-2 which it issued to the beneficiary in 2008 only, as well as copies of three pay statements which it issued to the beneficiary in 2009. The petitioner also provided its federal income tax returns for 2003, 2004, 2005, 2007 and 2008. The petitioner provided no evidence of any wages paid to the beneficiary prior to 2008, though the beneficiary claims to have worked for the petitioner at least as early as August 5, 2002; and no federal income tax returns for 2002 or 2006. Further, in its response to the director's RFE, the petitioner failed to explain the reason for omitting the W-2 or 1099 statements and the petitioner's tax returns for 2002 and 2006.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its 2002 and 2006 tax returns and evidence of wages paid to the beneficiary, in the form of either IRS Form W-2 or IRS Form 1099, for 2001 through 2007. The 2002 and 2006 tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The copies of IRS Form W-2 or IRS Form 1099 would have demonstrated any wages paid to the beneficiary. The petitioner's failure to submit these documents, without explanation, cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 beneficiary claims to have been

working for the petitioner at least as early as August 5, 2002. However, the petitioner provided evidence of wages paid to the beneficiary during 2008 and part of 2009 only.<sup>3</sup> The beneficiary's IRS Form W-2, Wage and Tax Statements, show compensation received from the petitioner, as shown in the table below.

- In 2008, the Form W-2 stated compensation of \$34,020.00.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 through 2007. In 2008, the petitioner paid the beneficiary a portion of the proffered wage. Therefore, while the petitioner must still demonstrate the ability to pay the beneficiary the full proffered wage in 2001, 2002, 2003, 2004, 2005, 2006 and 2007, it must only demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage for 2008, that difference being \$300.00. The petitioner also provided copies of pay statements which it issued to the beneficiary in 2009. According to these documents, as of March 18, 2009, the beneficiary had been paid \$8,100.00. Thus, the petitioner would have to demonstrate the ability to pay the difference between the wages paid and the full proffered wage for 2009.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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:

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<sup>3</sup> On appeal, counsel provides documents which she claims demonstrate that the petitioner paid the beneficiary during 2004, 2005, 2006 and 2007. However, these documents will be analyzed and their deficiencies will be explained later in this decision.

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 March 20, 2009 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 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001, 2003, 2004, 2005, 2007 and 2008, as shown in the table below.

- In 2001, the Form 1120S stated a net loss<sup>4</sup> of \$7,905.00.
- For 2002, the petitioner provided no regulatory prescribed evidence of net income.
- In 2003, the Form 1120S stated a net loss of \$32,840.00.

<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) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 27, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2008, the petitioner’s net income is found on Schedule K of its tax return for that year. However, the petitioner had no additional income, credits, deductions or other adjustments for any other years. Therefore, its net income is shown on line 21 of the first page of IRS Form 1120S for all other years.

- In 2004, the Form 1120S stated net income of \$20,780.00.
- In 2005, the Form 1120S stated net income of \$36,526.00.
- For 2006, the petitioner provided no regulatory prescribed evidence of net income.
- In 2007, the Form 1120S stated net income of \$44,860.00.
- In 2008, the Form 1120S stated net income of \$34,948.00

Therefore, for the years 2001, 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage. For 2002 and 2006, the petitioner did not demonstrate sufficient net income to pay the proffered wage because it did not supply regulatory prescribed evidence of its net income. For 2005, 2007 and 2008, the petitioner demonstrated sufficient net income to pay the beneficiary the full 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>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 2001, 2003 and 2004, as shown in the table below.

- In 2001, the Form 1120S, Schedule L stated net current liabilities of \$4,409.00.
- For 2002, the petitioner provided no regulatory prescribed evidence of its net current assets.
- In 2003, the Form 1120S, Schedule L stated net current assets of \$0.
- In 2004, the Form 1120S, Schedule L stated net current liabilities of \$3,906.00.
- For 2006, the petitioner provided no regulatory prescribed evidence of its net current assets.

Therefore, for the years 2001, 2003 and 2004, the petitioner did not have sufficient net current assets to pay the proffered wage. For 2002 and 2006, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage because it did not provide regulatory evidence of its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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<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.

On appeal, counsel asserts that USCIS should add the petitioner's deduction for depreciation to its net income since, counsel asserts, "depreciation by definition is not considered a loss. It is an annual deduction that allows the corporation to recover the costs of the business."

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

On appeal, counsel asserts that the petitioner "owns a fleet of cars that could be sold to pay any deficiency in the prevailing wage." In support of her assertion, counsel supplied copies of depreciation reports which accompany the petitioner's federal income tax returns for 2001, 2003, 2004 and 2005.

First, the depreciation reports identify work vans and trucks which are owned by the petitioning business. Being identified as work vehicles, and being depreciated as such, it would appear that such vehicles are integral for the operation of the petitioner's business. The petitioner has provided no evidence to demonstrate that it would be able to liquidate the vehicles which it uses for the operation of the business and continue to conduct such business. Second, the evidence does not demonstrate a growing fleet of vehicles. Rather, the tax returns show that the petitioner "disposed" of certain vehicles and replaced them with other vehicles. For example, in 2004, the petitioner disposed of at least four vehicles (two vans and two trucks) but replaced these with four new vehicles (two vans and two trucks) in the same year. In 2005, the petitioner disposed of another work truck but replaced it with another work truck in the same year. If the vehicles were inconsequential to the operation of the business, it would not appear reasonable for the petitioner to replace its vehicles as soon as it disposes of them.

Third, the petitioner must demonstrate the ability to pay as of the priority date and for each year thereafter until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). A petition may not be approved based upon the future projection of income or based upon a promise of remuneration. *Id.* 142, 144-145. If the petitioner had wanted to use income gained from the sale of its vehicles to pay the beneficiary, it should have sold such vehicles and made the funds available during the years in which its tax returns demonstrate a deficiency. Fourth, the petitioner has been depreciating the value of the vehicles identified since placing them in service. On appeal, the petitioner has provided no documentary evidence of the current market value for any of the vehicles to demonstrate whether the value of such vehicles would even be sufficient to pay the beneficiary.

On appeal, counsel also makes reference to a building which is identified on line 10a of Schedule L of the petitioner's U.S. Income Tax Return for an S Corporation. Counsel asserts that the building is valued at \$209,348 and that "the building plus depreciation over the years enable the company to pay the salary of the alien beneficiary of \$34,320." In support of her assertion, counsel references an administrative decision issued by this office, and *Full Gospel Portland Church V. Thornburg*, 730 F. Supp. 441, 449 (D.D.C. 1988) and *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA).

With respect to counsel's referenced to the unpublished administrative decision, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a choir director/piano teacher/accompanist. Here, counsel's assertion is that USCIS should treat its building, as evidence of its ability to pay, even though a building is not a current asset and would not likely be sold or encumbered to employ a worker, whereas a parishioner's pledge is a promise to give money to a church. Further, the petitioner has not explained the nature or purpose of the building in question and has not demonstrated that it could continue to operate its business if it were to sell said building.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

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On appeal, counsel also asserts that the petitioner has been paying the beneficiary since at least 2004. In support of her assertion, counsel supplies copies of deposit slips bearing the name of the beneficiary for 2004, 2005, 2006, 2007, 2008 and 2009. However, these documents are not checks written by an employer to the beneficiary. Rather, they are simply documents which the beneficiary used to deposit funds into a bank account. The petitioner has provided no documentary evidence identifying the source of the funds and has provided no documentary evidence demonstrating that that petitioner paid the beneficiary the amounts represented on the deposit slips.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On their own, deposit slips are not evidence of wages paid by the petitioner to the beneficiary.

In asserting that the petitioner has been paying the beneficiary since 2004, counsel also makes reference to checks written by Arturo Moreno to the beneficiary in 2005, 2006 and 2007.

However, 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 (emphasis added).

The petitioner must demonstrate the ability to pay the beneficiary from the priority date until the beneficiary obtains lawful permanent residence.

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'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Therefore, that [REDACTED] sole shareholder in the petitioning entity, paid the beneficiary some funds from his personal account, is not demonstrative of the petitioner's ability to pay since a corporation is a separate and distinct legal entity from its owners and shareholders. That same rationale obtains for the personal check written by [REDACTED] to the beneficiary.

On appeal, counsel also provides copies of checks which the petitioning corporation issued to the beneficiary in 2008. However, the AAO has already considered the wages which the petitioner paid to the beneficiary in 2008 and has found that the petitioner demonstrated the ability to pay in that year based upon consideration both of the wages already paid and the petitioner's net income.

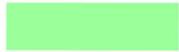
Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner provided financial evidence for six years of business operations with gaps for two years. Sales and payroll have been inconsistent and modest. Officer compensation has been consistent and marginal. The petitioner has not demonstrated the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or loss, its reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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.

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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.