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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



U.S. Citizenship  
and Immigration  
Services



DATE: **AUG 29 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

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 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

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center (director), on February 25, 2008. The petitioner filed a subsequent motion to reopen and reconsider, which was granted by the director. The matter was reopened and the director requested additional evidence from the petitioner. Upon receipt of the petitioner's response to the director's request, the director denied the petition on December 15, 2008. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides gas analysis services to large companies in the gas industry.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a Latin American market representative. 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 December 15, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. Section 203(b)(3)(A)(i) of 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

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<sup>1</sup>The record contains variations of the petitioner's name, for example the petition was filed using the variant [REDACTED] the labor certification was filed using the variant [REDACTED] – Jet Specialty, and the petitioner's tax returns are filed using the variant [REDACTED]. The Certificate of Incorporation issued by State of Oklahoma contained in the record indicates the petitioner's name is [REDACTED].

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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$48,500 per year. The Form ETA 750 states that the position requires six years of grade school, five years of high school, five years of college, a college degree in business administration with a concentration in marketing and 30 months of experience as a Latin American market representative. The special requirements for the position are stated as follows: "Successful candidate must be bilingual: English and Spanish with a high level of fluency."

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>

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$321,204, and to currently employ 6 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

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'l Comm'r 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'l Comm'r 1967).

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

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date until the present time.

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 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.

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 C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on December 10, 2008, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s federal income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for the years 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$1,296.<sup>3</sup>
- In 2002, the Form 1120 stated net income of \$3,933.
- In 2003, the Form 1120 stated net income of \$11.
- In 2004, the Form 1120 stated net income of \$30,101.
- In 2005, the Form 1120 stated net income of \$19,191.
- In 2006, the Form 1120 stated net income of \$8,626.
- In 2007, the Form 1120 stated net income of \$2,802.

Therefore, for the years 2001 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the

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<sup>3</sup>The director incorrectly stated this amount as \$67,412; however, a close look at the tax return reveals that the petitioner’s total deductions were incorrectly listed on line 28 instead of being listed on line 27, and the petitioner’s other deductions were incorrectly listed on line 27 instead of line 26. Furthermore, the petitioner’s total income at line 11 should have been \$86,904 instead of \$89,904. The mistakes on the 2001 tax return cast doubt on whether the return was actually filed and accepted by the Internal Revenue Service (IRS). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 through 2007 as shown in the table below. It is noted the petitioner did not submit either an annual report or audited financial statement for any year.

- In 2001, the Form 1120 did not include its Schedule L.<sup>5</sup>
- In 2002, the Form 1120 stated net current assets of \$0.<sup>6</sup>
- In 2003, the Form 1120 stated net current assets of \$0.<sup>7</sup>
- In 2004, the Form 1120 did not include its Schedule L.<sup>8</sup>
- In 2005, the Form 1120 did not include its Schedule L.<sup>9</sup>
- In 2006, the Form 1120 did not include its Schedule L.<sup>10</sup>

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<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>5</sup>The petitioner submitted only pages 1, 2, and 3 of its tax return, which did not include its Schedule L. For 2001 a Schedule L was required. See [http://www.irs.gov/pub/irs-prior/i1120\\_a--2001.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2001.pdf) (accessed July 3, 2012).

<sup>6</sup>The petitioner submitted only pages 1 and 4 of its tax return. The Schedule L lists no assets on lines 1 through 6 and no liabilities on lines 16 through 18.

<sup>7</sup>The petitioner submitted only a partial tax return which included both page 1 and page 4. The Schedule L lists no assets on lines 1 through 6 and no liabilities on lines 16 through 18.

<sup>8</sup>The petitioner submitted only a partial return for 2004, which did not include its Schedule L. For 2004, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L if the "Yes" box on Schedule K, question 13, is checked. See [http://www.irs.gov/pub/irs-prior/i1120\\_a--2004.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2004.pdf) (accessed July 3, 2012). The petitioner has checked the "Yes" box on Schedule K, question 13.

<sup>9</sup>The petitioner submitted only a partial return for 2005, which did not include its Schedule L. For 2005, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L if the "Yes" box on Schedule K, question 13, is checked. See [http://www.irs.gov/pub/irs-prior/i1120\\_a--2005.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2005.pdf) (accessed July 3, 2012). The petitioner did not check either the "Yes" or "No" box on Schedule K, question 13.

<sup>10</sup>The petitioner submitted only a partial return for 2006, which did not include its Schedule L. For 2006, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L if the "Yes" box

- In 2007, the Form 1120 stated net current assets of \$0.<sup>11</sup>

Therefore, for the years 2001 through 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

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, its net income, or its net current assets.

On appeal, counsel asserts that the director should have considered the petitioner's approximately \$600,000 worth of lab equipment, which has been mostly depreciated, but which is mostly unencumbered. As evidence, counsel submitted a list and pictures of lab equipment purportedly owned by the petitioner. The list of equipment is accompanied by a letter from the petitioner's accountant who states "To the best of our knowledge the assets of the petitioner total \$621,650 less depreciation. ...The asset amounts are unaudited and provided by the corporation." Lab equipment should be reflected on the petitioner's tax return at Schedule L, line 10a as buildings and other depreciable assets. As previously noted, the petitioner did not submit its Schedule L, annual report, or audited financial statement for the years 2001, 2004, 2005, and 2006; however, its 2004 return at on Schedule K, question 13 indicated that its total receipts and its total assets at the end of the 2004 were less than \$250,000. For 2002 and 2003 the petitioner's Schedule L, line 10a listed total depreciable assets of \$18,404 [not \$621,650], and in 2007, the petitioner's Schedule L, line 10a listed total depreciable assets of \$17,000 [not \$621,650]. This inconsistency regarding the petitioner's assets is not explained.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Moreover, counsel's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is without merit. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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on Schedule K, question 13, is checked. See [http://www.irs.gov/pub/irs-prior/i1120\\_a--2006.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2006.pdf) (accessed July 3, 2012). The petitioner checked the "No" box on Schedule K, question 13.

<sup>11</sup>The Schedule L lists no assets on lines 1 through 6 and no liabilities on lines 16 through 18.

Counsel also asserts that the petitioner's owner had sufficient personal assets to initially pay the beneficiary's salary. As evidence counsel refers to a December 9, 2008 statement from [REDACTED] who identifies himself as president and sole shareholder of the petitioner. The petitioner is a corporation and 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."

Counsel further asserts that the director ignored the fact that the petitioner is owned by a sole shareholder, [REDACTED] and as such the sole shareholder could have contributed additional funds to pay the salary. Counsel does not reference any evidence in the file to support the assertion that [REDACTED] would have contributed additional funds. 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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the petitioner's 2001 tax return at Schedule K, question 5 asks "At the end of the tax year, did any individual, partnership, corporation, estate, or trust own, directly or indirectly, 50% or more of the corporation's voting stock?" The question is marked "No," which indicates that the petitioner was not owned by a single shareholder in 2001 and this inconsistency has not been explained.<sup>12</sup>

Counsel also states that the beneficiary's proposed employment will increase the petitioner's income. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Counsel submits no detail or documentation to explain how the beneficiary's employment will increase the petitioner's income.<sup>13</sup> While *Masonry Masters, Inc.* mentions the ability of a beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.<sup>14</sup> Moreover, the AAO is bound by the Act, agency regulations, precedent decisions of the

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<sup>12</sup>It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho* 19 I&N Dec. 582, 591-592 (BIA 1988).

<sup>13</sup>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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

<sup>14</sup>Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

agency, and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit), and as such *Masonry Masters, Inc.* is not binding in the 10<sup>th</sup> Circuit Court of Appeals, which is the circuit in which this action arose.

In addition, counsel asserts that the director should have considered the petitioner's normal accounting practices. Counsel cites *Matter of \_\_\_\_\_*, VSC, EAC 01-018-50413 in support of his assertion. Counsel neither explains why the petitioner's normal accounting practices should have been considered nor submits any evidence to support his assertion.<sup>15</sup> Moreover, counsel cites to a decision issued by the AAO, but does not provide its published citation. 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).

Counsel also states that where the employer is a sole proprietorship, the individual's assets should be considered in determining whether the employer has the ability to pay the proffered wage. Counsel cites *Ranchito Coletero* 2002-INA-104 (2004 (BALCA)). Counsel does not state how DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. Moreover, the petitioner is a corporation, not a sole proprietorship. As previously noted, a corporation is a separate and distinct legal entity from its owners and shareholders, thus 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).

Further, counsel asserts that the director should have considered officer compensation. As evidence counsel refers to a December 9, 2008 statement from \_\_\_\_\_ who identifies himself as the petitioner's president and sole shareholder. \_\_\_\_\_ states that he "would have foregone [his] salary...to pay the beneficiary's salary during this time, if needed to." Additionally, the record contains a copy of IRS Form W-2 issued to \_\_\_\_\_ for 2006 and 2007 showing \_\_\_\_\_ received \$30,000 each year from the petitioner. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. However, as previously noted, Schedule K, question 5 of the petitioner's 2001 tax return indicates that \_\_\_\_\_ was not the sole shareholder in 2001. The petitioner's tax return for 2002 did not include a Schedule K. The petitioner's tax returns for 2003, 2005, 2006, and 2007 included a Schedule K, but

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<sup>15</sup>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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

question 5 was not completed. The petitioner's 2004 tax return included a Schedule K and question 5 was marked "yes", but the tax return did not contain a schedule listing the shareholder(s) and his/their identifying number(s) as required. Therefore, the record does not contain evidence that [REDACTED] was the petitioner's sole shareholder other than [REDACTED]'s statement. [REDACTED]'s statement is self-serving and does not provide independent, objective evidence of the petitioner's ownership. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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. at 165.

Finally, counsel asserts that the director should have considered the totality of the circumstances. 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, there is no evidence of the occurrence of any uncharacteristic business expenditures or losses from which the petitioner has since recovered. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be 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.

Counsel states on appeal that the director failed to recognize that sometimes companies will operate at a loss for a period of time to improve their business position in the long run. In those instances the documentation should fully explain the sources of funding for the entity and the expected profit potential. Counsel cited Section 22.2(c) of the Adjudicators Field Manual (AFM) as authority for

his assertion. According to the petitioner's tax returns, it was not operating at a loss during 2001 through 2007; furthermore, counsel did not explain the sources of funding for the petitioner or the expected profit potential. Moreover, the introduction to the AFM<sup>16</sup> contains the following statements:

The AFM comprehensively details USCIS policies and procedures for adjudicating applications and petitions. USCIS updates the AFM regularly to incorporate new policies and procedures established through statutes, regulations, policy memoranda, or any other pertinent publications. . . . Important Notice: Nothing in the AFM shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). Therefore, counsel's reliance on the AFM as precedent is misplaced.

Counsel asserts that the director determined the petitioner had the ability to pay in 2001, and if the petitioner had placed the beneficiary on its payroll in 2001, the beneficiary would have generated income the petitioner could have used to establish its ability to pay. Therefore, counsel asserts that it is the combination of the lengthy processing by the DOL and USCIS coupled with illness that the petitioner's income tax returns do not adequately demonstrate the true nature of the petitioner's ability to pay the proffered wage. As previously discussed, the director incorrectly determined that the petitioner had the ability to pay the proffered wage in 2001. Moreover, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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.

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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<sup>16</sup>See <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> (accessed July 2, 2012).

(b)(6)

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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.