

(b)(6)

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: **DEC 08 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

SELF REPRESENTED

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,

*Rachel M. Tono*  
for

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**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 an ethnic restaurant. It seeks to employ the beneficiary permanently in the United States as an ethnic sous chef. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

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

As set forth in the director's April 30, 2001 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$750.00 per week (\$39,000.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered: ethnic sous chef.

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, the petitioner submits a brief; wage and tax detail reports for the fourth quarter of 2003 through the fourth quarter of 2008; bank statements from 2001, 2002, 2003, 2004, 2005, 2007, and 2008; and a copy of the petitioner's U.S. Return of Partnership Income (Form 1065) for 2007.

The record indicates the petitioner is structured as a limited partnership and filed its tax returns on Internal Revenue Service (IRS) Form 1065. On the petition, the petitioner claimed to have been established in 1991 and currently to employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since December 1995.

On appeal, the petitioner asserts that the financial statements submitted as evidence demonstrate that the petitioner had the ability to pay the beneficiary for each year from the priority date through the date of the decision and that the director erred in considering additional beneficiaries, which were petitioned for by other restaurants associated with the petitioner. On appeal, the petitioner also cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7<sup>th</sup> Cir. 2009) to assert that the director should have considered other factors such as cash flow as represented by the petitioner's bank statements. On appeal, the petitioner also asserts that the employment of the beneficiary will increase the petitioner's income and that the director erred in neglecting to consider this prospect. On appeal, the petitioner also asserts that the director erred in neglecting to consider the totality of the petitioner's financial circumstances.

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'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

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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).

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).

It is noted that the instant case arose in the seventh circuit. Therefore, in this case, the AAO is bound by precedent decisions of the circuit court of appeals for the seventh circuit. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

The seventh circuit court of appeals recently issued a precedent decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7<sup>th</sup> Cir. 2009). In that case, the seventh circuit directly addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to employ the beneficiary at a salary of over \$50,000.00 per year.<sup>2</sup> The beneficiary had been working for the employer as an independent contractor and was paid less than the proffered wage. The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.<sup>3</sup> The court also noted that the owner of the corporation received officer compensation of approximately \$40,000.00.<sup>4</sup>

In considering the employer's ability to pay the proffered wage, 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."<sup>5</sup>

The court then turned to an examination of the USCIS method for determining an employer's ability to pay the proffered wage. The court noted that USCIS "looks at a firm's income tax returns and balance sheet first."<sup>6</sup> The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."<sup>7</sup> The court found that the employer had failed to establish that it had sufficient resources to pay the proffered wage "plus employment taxes (plus employee benefits, if any)."<sup>8</sup>

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method, which is described in detail below, involves (1) a determination of whether a petitioner establishes by documentary evidence that it

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<sup>2</sup> 563 F.3d at 595.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 596.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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 (Reg. Comm. 1967).

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)." As noted above, because the instant case arose in the seventh circuit, the AAO is bound by the seventh circuit's decision in *Construction and Design*. Therefore, pursuant to the decision in *Construction and Design*, the petitioner in the instant case must 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 costs of such benefits are significant. 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 1.4.<sup>9</sup> In this case, as noted above, the proffered wage as stated on the Form ETA 750 is \$39,000.00 per year. Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to \$54,600.00 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must establish its ability to pay \$54,600.00 per year.

In the instant case, the petitioner has not demonstrated that it employed the beneficiary as an independent contractor, as in *Construction and Design*. Therefore, the facts of the instant case can be distinguished from *Construction and Design*.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker at a wage of \$17.43 per hour (\$36,254.40 per year), with a priority date of May 29, 2002.<sup>10</sup> However, using the OMB-approved formula, the "fully burdened" wage rate for this beneficiary equates to \$50,756.16.<sup>11</sup> Thus, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner must also establish its ability to pay the second beneficiary \$50,756.16 per year. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as

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<sup>9</sup> The 1.4 multiplier is from the Bureau of Labor Statistics 2012:  
<http://www.bls.gov/news.release/ecec.t01.htm>.

<sup>10</sup> [REDACTED]

<sup>11</sup> In his response to the director's January 28, 2009 Request for Evidence (RFE), the petitioner stated that it was not employing the beneficiary of [REDACTED] at the time the response was submitted.

of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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 submitted copies of IRS Forms W-2, Wage and Tax Statements, which it issued to the beneficiary in 2001, 2002, 2003, 2005, 2006, 2007, and 2008. The beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2001, 2002, 2003, 2005, 2006, 2007, and 2008 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$10,050.00.<sup>12</sup>
- In 2002, the Form W-2 stated compensation of \$1,030.75.
- In 2003, the Form W-2 stated compensation of \$16,883.20.
- For 2004, the petitioner provided no evidence of wages paid to the beneficiary.
- In 2005, the Form W-2 stated compensation of \$22,710.87.
- In 2006, the Form W-2 stated compensation of \$29,779.20
- In 2007, the Form W-2 stated compensation of \$31,390.70.
- In 2008, the Form W-2 stated compensation of \$31,031.28.

According to the evidence submitted, although the petitioner paid the beneficiary in 2001, 2002, 2003, 2005, 2006, 2007, and 2008, it never paid the beneficiary the full proffered wage. Therefore, the petitioner must still demonstrate the ability to pay the difference between the wages already paid and the "fully burdened" wage, as required by *Construction and Design*, for those years, the difference being \$44,550.00 for 2001; \$53,569.25 for 2002; \$37,716.80 for 2003; \$31,889.13 for 2005; \$24,820.80 for 2006; \$23,209.30 for 2007; and \$23,568.72 for 2008. For 2004, the petitioner must demonstrate the ability to pay the "fully burdened" wage.

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

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<sup>12</sup> It should be noted that the IRS Forms W-2, which the petitioner issued to the beneficiary from 2001 through 2008 bear three different social security numbers, none of which are registered.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 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).

The record before the director closed on April 21, 2009 with the receipt by the director of the petitioner's submissions in response to the director's second RFE. As of that date, the petitioner's 2008 federal income tax return should have been prepared and filed with the IRS.<sup>13</sup> However, even with the appeal, which was received on June 22, 2009, the most recent federal income tax return

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<sup>13</sup> The petitioner's federal income tax returns were filed in either February or March of the following calendar year, according to the dates applied to the forms by the petitioner.

supplied was the 2007 return. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net income<sup>14</sup> of \$53,152.00.
- In 2002, the petitioner's Form 1065 stated a net loss of \$92,936.00.
- In 2003, the petitioner's Form 1065 stated a net loss of \$85,593.00.
- In 2004, the petitioner's Form 1065 stated net income of \$173,129.00.
- In 2005, the petitioner's Form 1065 stated net income of \$151,062.00.
- In 2006, the petitioner's Form 1065 stated net income of \$136,216.00.
- In 2007, the petitioner's Form 1065 stated net income of \$82,130.00.
- For 2008, the petitioner provided no regulatory prescribed evidence of its net income.

As explained above, the petitioner filed another I-140, which was pending at a time relevant to the instant petition.<sup>15</sup> In that case, the priority date accorded by the approval of the employment-based immigrant visa petition is May 29, 2002. Further, the beneficiary of the approved immigrant visa petition has not obtained lawful permanent residence. According to the petitioner, the proffered wage associated with the other I-140 is \$17.43 per hour (\$36,254.40 per year). However, the "fully burdened" wage, required by *Construction and Design*, is \$50,756.16. Therefore, for each year from 2002 through 2008, the petitioner must demonstrate the ability to pay both beneficiaries the sum of \$105,356.16. For 2001, the petitioner must demonstrate the ability to pay solely the beneficiary of the instant petition.

Therefore, for the year 2001, the petitioner did establish that it had sufficient net income to pay the beneficiary of the instant petition the difference between wages already paid and the full proffered wage as well as the difference between wages already paid and the "fully burdened" wage. For 2002 and 2003, the petitioner did not establish that it had sufficient net income to pay both beneficiaries the proffered wage, even taking into consideration the wages already paid to the beneficiary of the instant petition. For 2004, 2005, and 2006, the petitioner demonstrated sufficient net income to pay both beneficiaries the proffered wage as well as the "fully burdened" wage. For 2007, the petitioner

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<sup>14</sup> For a limited partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed September 14, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K for each year from 2001 through 2007 has relevant entries for additional income, credits, deductions, and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

<sup>15</sup>

demonstrated sufficient net income to pay both beneficiaries the proffered wage and the “fully burdened” wage, when considering wages already paid to the beneficiary of the instant petition. For 2008, the petitioner provided no regulatory prescribed evidence of its net income and, therefore, has not demonstrated the ability to pay either beneficiary.

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 difference between the petitioner’s current assets and current liabilities.<sup>16</sup> A partnership’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner’s tax returns for 2002 and 2003 stated its net current assets as detailed in the table below.

- In 2002, the petitioner’s Form 1065, Schedule L stated net current liabilities of \$90,982.00.
- In 2003, the petitioner’s Form 1065, Schedule L stated net current liabilities of \$206,088.00.
- For 2008, the petitioner provided no regulatory prescribed evidence of its net current assets.

Therefore, for the years 2002 and 2003, the petitioner did not establish that it had sufficient net current assets to pay either beneficiary the proffered wage or the difference between wages already paid and the full proffered wage. For 2008, the petitioner did not provide any regulatory prescribed evidence of its net current assets and, therefore, has not demonstrated the ability to pay either beneficiary the proffered wage for that year.

Thus, 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 or the “fully burdened wage” as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, the petitioner asserts that the tax documents and wage reports demonstrate that the petitioner had the ability to pay the beneficiary of the instant petition the proffered wage from the priority date in 2001 through at least 2006. The petitioner further asserts that the director erred in requiring the petitioner to demonstrate the ability to pay the beneficiaries of other petitions, which were filed by restaurants owned by the same group which owns the petitioning entity. The petitioner

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<sup>16</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.

states that it did not file any petitions for other beneficiaries and, therefore, is not obligated to demonstrate the ability to pay anyone other than the beneficiary of the instant petition.

The AAO concurs in part with the petitioner's assertion. A search of USCIS records, however, shows that the petitioner ( [REDACTED] ) with the Employer Identification Number [REDACTED] filed one other I-140 petition, that petition having been filed on July 20, 2007 and approved on February 25, 2009. The priority date conferred by the approval of the employment-based immigrant visa petition is May 29, 2002. Therefore, whether or not the petitioner employed the beneficiary of the other I-140 petition at the time the instant petition was filed, it is obligated to demonstrate the ability to pay the beneficiaries of both petitions. In his decision, the director analyzed the petitioner's ability to pay the beneficiaries of three I-140 petitions, including the beneficiary of the instant petition. However, one of the three beneficiaries was, indeed, petitioned by [REDACTED] and not by the petitioner.<sup>17</sup> As set forth above, the AAO analyzed the petitioner's ability to pay two beneficiaries from 2002 onward and only one beneficiary in 2001.

On appeal, the petitioner also cites to *Construction and Design* to assert that the AAO should consider the petitioner's cash flow in order to determine whether or not the petitioner has the ability to pay the proffered wage. The petitioner asserts that the bank statements provided as evidence demonstrate sufficient cash flow for each year to pay the beneficiary of the instant petition the full proffered wage.

As articulated above, the AAO has analyzed the petitioner's financial situation in accordance with the requirements of *Construction and Design*. Respecting the petitioner's reliance on bank statements, such 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, 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 returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L which was considered above in determining the petitioner's net current assets.

On appeal, the petitioner also cites to *Construction and Design* for the premise that employing the beneficiary would increase the petitioner's income in the future. Although part of this decision mentions the possibility of a newly hired employee to generate income under certain circumstances and also considering the likelihood that the employer would have to borrow money to compensate the worker initially, the decision does not state that the employment of new workers will necessarily result in the generation of additional income or that USCIS is required to assume that the

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<sup>17</sup> [REDACTED]

employment of new workers will result in the generation of additional income. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an ethnic sous chef will significantly increase profits for the petitioner's restaurant. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Further, a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 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.

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's gross sales and payroll did not grow significantly during the period from 2001 through 2007. The petitioner has not established the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, 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.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.