

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

B6



DATE: **DEC 08 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the Texas Service Center denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food service franchiser that owns and operates the "King Pollo" fast-food restaurant in New Carrollton, Maryland. It seeks to employ the beneficiary permanently in the United States at that restaurant as a Food Service Manager. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL)<sup>1</sup>. 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 September 14, 2010 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

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<sup>1</sup> The DOL approved the labor certification for a worksite in Laurel, Maryland. On the Form I-140, however, the petitioner indicates the beneficiary will work in New Carrollton, Maryland. Because both locations are in the same Metropolitan Statistical Area (MSA), the labor certification remains valid. See 20 C.F.R. § 656.3 ("Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. ... If the place of intended employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the intended place of employment ..."); 20 C.F.R. § 656.30(c)(2) (a labor certification is valid only for "the area of intended employment").

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on August 16, 2007. The proffered wage as stated on the ETA Form 9089 is \$15.31 per hour (or \$31,844.80 per year based on a 40-hour work week). The ETA Form 9089 states that the position requires an associate's degree or the foreign equivalent in Food Service Management or Business Administration.

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 an S corporation. On the petition, the petitioner claimed to have been incorporated in 2001 and to employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, which the beneficiary signed in response to the director's Request for Evidence of June 21, 2010, the beneficiary claimed to have worked for the petitioner since December 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. The totality of the circumstances affecting the petitioning business will also be considered. 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 submitted copies of the beneficiary's W-2 forms for 2007, 2008 and 2009. The W-2 forms establish that the petitioner paid the beneficiary \$23,220.83 in 2007, \$14,653.20 in 2008, and \$20,051.20 in 2009. The AAO agrees with the director that the petitioner failed to demonstrate that it paid the beneficiary the offered annual wage of \$31,844.80 in 2008 and 2009. The AAO disagrees, however, with the director's conclusion that the petitioner paid the beneficiary the offered wage rate in 2007.

The director reasoned that the petitioner was obliged to pay a 2007 wage rate of only \$11,952.70 from the priority date of August 16, 2007 until the end of the year. The AAO, however, will not prorate the proffered wage for the portion of the year after the priority date because the petitioner has not submitted evidence that it paid at least \$11,952.70 of the beneficiary's 2007 wages after the August 16, 2007 priority date. The petitioner could have paid the beneficiary all of her 2007 wages before August 16, 2007 and been unable to pay any wages for the rest of that year. The petitioner has not submitted monthly income statements or pay stubs, for example, to show that it paid at least \$11,952.70 of the 2007 wages to the beneficiary after August 16, 2007. Thus, the petitioner has not demonstrated that it paid the entire proffered wage to the beneficiary in 2007, 2008 and 2009. For each of those years, the petitioner must demonstrate that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which amounts to \$8,623.97 for 2007, \$17,191.60 for 2008 and \$11,793.60 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:

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 petitioner has submitted copies of its federal income tax returns for 2007, 2008, 2009 and 2010. The returns show that the petitioner reported net income on the Forms 1120S<sup>3</sup> of \$11,641.42 in 2007, [\$53,536.30] in 2008, [\$6,779.66] in 2009, and [\$907.31] in 2010. Combining the \$23,220.83 that the petitioner paid the beneficiary in 2007 with its 2007 net income of \$11,641.42 yields an

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<sup>3</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 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 20, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions or other adjustments shown on its Schedule K for 2007, 2008, 2009 and 2010, the petitioner’s net income is found on line 21 of page one of its IRS Form 1120S.

amount that exceeds the offered annual wage of \$31,844.80. The petitioner therefore has demonstrated its ability to pay the offered wage rate in 2007. But the petitioner has not shown its ability to pay the offered wage in 2008, 2009 and 2010 because its reported net incomes in those years were negative, and do not meet or exceed the offered wage when combined with the wages paid to the beneficiary in those years.

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>4</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 reported net current assets of \$[24,720] in 2008, \$[73,870] in 2009, and \$[85,735] in 2010. Because the petitioner reported negative net current asset amounts for 2008, 2009 and 2010, the petitioner's net current assets were insufficient to demonstrate an ability to pay the offered wage in those years.

In the appellate brief, counsel stated that the petitioner's tax returns "show a \$100,000.00 loan from a relative of the [shareholders] as a liability." Indeed, the petitioner's tax returns for 2007, 2009 and 2010 reported end-of-year "Other current liabilities" on Schedule L, line 18 as \$100,000. If the amounts listed in "Other current liabilities" on the tax returns reflect a \$100,000 loan, however, the recurrence of the liability amount on multiple, annual tax returns suggests that the liability is not a current liability, which would be payable within 12 months, but rather a long-term liability payable over more than one year<sup>5</sup>.

The evidence is insufficient for USCIS to determine whether the current liability amounts of \$100,000 listed on petitioner's tax returns reflect a long-term loan balance. The only evidence of the existence of the loan and its listing on petitioner's tax returns is the unsupported statement of petitioner's counsel, which USCIS cannot consider as evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the unsupported assertions of counsel do not constitute evidence.) The petitioner did not submit a copy of the loan agreement, other evidence of the loan's terms and conditions, proof of interest payments, or certified tax returns amending the "Other current liability" amounts. In addition, if the petitioner listed the \$100,000 liability amounts on its 2007, 2009 and

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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> If the petitioner intends to argue that it has sufficient net current assets to pay the offered wage rate, it would have to restate its current liabilities and submit IRS-certified, amended tax returns.

2010 tax returns to reflect a \$100,000 loan, it is unclear why the petitioner listed the end-of-year "Other current liabilities" amount on its 2008 tax return as only \$50,000. USCIS will therefore take the petitioner's tax returns at face value despite counsel's assertion of the petitioner's \$100,000 loan liability amount.

In summary, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date based on the wages paid to the beneficiary, its net income, or its net current assets.

In addition to establishing its ability to pay the beneficiary's offered wage, the petitioner must also establish the continuing ability, as of the priority date, to pay the offered wages of other beneficiaries of approved or pending visa petitions. *See Matter of Great Wall*, 16 I&N Dec. 144-45; 8 C.F.R. Sect. 204.5(g)(2). USCIS records indicate that the petitioner has filed at least 12 visa petitions since 2006, including six I-129 H-1B nonimmigrant visa petitions and six I-140 immigrant visa petitions. The petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the I-140 denial date or the date the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner must demonstrate that it has paid each H-1B beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In the instant case, the petitioner has not established its continuing ability to pay both the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Further, the petitioner does not appear to have complied with its H-1B obligations in accordance with DOL regulations. According to USCIS records, the petitioner was required to pay the beneficiary at least \$38,560 a year in H-1B visa status from November 7, 2006 to September 28, 2009, and at least \$25,766 a year in H-1B status thereafter until September 28, 2012. The petitioner's petition to extend the beneficiary's H-1B status at an annual salary of \$23,322 is currently pending, according to USCIS records. As discussed above, the W-2 forms that the petitioner submitted show that the petitioner paid the beneficiary \$23,220.83 in 2007, \$14,653.20 in 2008, and \$20,051.20 in 2009. The amounts on the beneficiary's W-2 forms do not equal or exceed the required H-1B prevailing wage amounts of \$38,560 or \$25,766 for 2007, 2008 and 2009. In addition, on its 2010 income tax return, the petitioner reported total salaries and wages paid of \$24,131.20, an amount insufficient to pay the beneficiary's H-1B prevailing wage rate (and the wages of other claimed employees).

On appeal, the petitioner submitted copies of its monthly bank statements from March 2008 to September 2010. The statements show ending monthly balances ranging from a low of \$423.34 in July 2008 to a high of \$118,334.59 in December 2009. The bank statements, however, are insufficient evidence of the petitioner's ability to pay the offered wage rate. The petitioner did not submit evidence to demonstrate that the funds reported on its bank statements reflect additional cash that was available to pay wages. Companies usually reflect cash in their bank accounts on their income tax returns, either in the taxable income amount (income minus deductions) or in the cash specified on Schedule L, line 1 under "current assets." As discussed above, USCIS has already

considered the petitioner's net income and net current assets, as listed on its tax returns, in determining that the petitioner has not demonstrated a continuing ability to pay the offered wage. Without evidence to the contrary, USCIS will not consider the amounts in the petitioner's bank accounts as additional funds available to pay wages.

The petitioner's two shareholders – a husband and wife – also assert in separate, sworn affidavits that the beneficiary's continued employment “will increase our income and more than pay for her salary.” The petitioner's counsel also argues that the beneficiary's employment will generate additional income for the petitioner, citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). USCIS, however, is not bound to follow the published decisions of United States courts in cases arising outside the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Also, although part of the *Masonry Master* decision mentions the ability of the 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>6</sup> The Regional Commissioner has also stated:

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.

*Matter of Great Wall*, 16 I&N Dec. at 144-145.

Further, in this instance, the petitioner has not submitted any details or documentation to explain how the beneficiary's employment will significantly increase its profits. USCIS notes that the beneficiary claims, and the petitioner's documentation confirms, that the petitioner has worked for the petitioner since December 2006. During this time, despite the beneficiary's employment, the petitioner's tax returns evidenced a drop in profits from \$11,641.42 in 2007 to \$(53,536.30)<sup>7</sup> in 2008. According to its tax returns, the petitioner, despite the beneficiary's continued employment, still had not returned to profitability by the end of 2010. The preponderance of the evidence therefore does not support petitioner's assertion that the beneficiary's employment will lead to increased income.

One of the petitioner's shareholders, [REDACTED] also states in her affidavit that, “[i]f need be[,] we will reduce our salary to pay for [the beneficiary's] salary.” Shareholders of closely held corporations, like petitioner, have the authority to allocate corporate expenses 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 1120S U.S. Corporation Income Tax Return. For this reason, a petitioner's figures for compensation of officers

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<sup>6</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.

<sup>7</sup> The AAO uses parentheses around numbers to indicate a negative amount.

may be considered in appropriate circumstances as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 50 percent of the company's stock, with her husband owning the remaining 50 percent. According to the petitioner's tax returns, the petitioner paid its officers totals of \$13,850.50 in 2008, \$54,000 in 2009, and \$72,000 in 2010. USCIS notes that the compensation that the company's officers received during these three years was not a fixed salary.

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." In the present case, however, the petitioner is not suggesting that USCIS examine the personal assets of the petitioner's shareholders, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their business.

Despite the valid premise of the petitioner's argument, the evidence is insufficient to determine whether the shareholder can forego compensation to pay the beneficiary's offered wage rate. The petitioner has not provided evidence of the shareholder's financial position, other than the facts that she is married to the petitioner's other shareholder who also receives officer compensation. But there is no evidence of the shareholder's personal liabilities, expenses or dependents, or whether she has sources of additional income. In addition, only [REDACTED] has expressed a willingness to forego officer compensation. Her husband made no such statement in his affidavit. If both officers do not pledge to forego their salaries, only one officer's compensation can be available to pay the offered wage.

Further, [REDACTED] expressed a willingness to forego her salary in the future. In her affidavit, she stated "... we *will* reduce our salary ..." (emphasis added). An officer's pledge to forego future compensation is not sufficient to establish the ability to pay the beneficiary's offered wage rate in the past. *See* 8 C.F.R. Sect. 204.5(g)(2) (requiring petitioner to demonstrate "continuing" ability to pay from "the time the priority date is established"). In any event, the foregoing of the total \$13,850.50 in officer compensation for 2008, as listed on petitioner's tax return, would not have been sufficient to pay the \$31,844.80 offered annual wage rate of the beneficiary for that year. The petitioner has therefore not established its ability to pay the offered wage rate by the shareholder's willingness to forego future compensation.

Finally, the petitioner argues that the director should have considered the totality of the circumstances in determining whether the petitioner has the continuing ability to pay the offered wage rate. The petitioner's argument is well-taken. As indicated above, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa, supra.*

In *Sonegawa*, the petitioning entity had been in business for over 11 years. During the year in which the petition was filed, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were substantial moving costs and also a period of time when the petitioner was unable to conduct 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, petitioner argues that, as in *Sonegawa*, a temporary, uncharacteristic business expense prevented it from establishing its ability to pay the offered wage rate. Specifically, the petitioner claims that it ran a profitable business until the end of 2007, when it sold its three fast-food restaurant franchises to raise capital to build its current restaurant. The petitioner said it encountered unexpected construction delays, preventing it from opening the new restaurant until August 2008. The petitioner also said it underestimated costs, spending more than \$300,000 on construction, relocation, supplies and equipment to launch the new restaurant. According to the petitioner, its business improved in 2009 and 2010, indicating its ability to pay the offered wage.

While the petitioner makes a cogent argument, the evidence is insufficient to support approval under *Sonegawa*. The petitioner's tax returns do not support its argument that it has recovered from its "bad year" of 2008. The tax returns show that the petitioner's gross sales plummeted from \$854,923.19 in 2007 to \$465,600.50 in 2008, and that its net income similarly fell from \$11,641.42 in 2007 to \$(53,536.30) in 2008. But, from 2008 to 2010, the petitioner's gross sales have not increased. Rather, they have fallen from \$465,600.50 in 2008 to \$365,365.70 in 2009 to \$357,636.43 in 2010, according to petitioner's tax returns.

Perhaps, the petitioner's inclusion of financial data from another restaurant on its 2008 tax return explains the large drops in the petitioner's gross sales and net income from 2008 to 2009. But the petitioner said its interests in the other restaurant ended in early 2008. So, the termination of the petitioner's interests in the other restaurant would not explain the drop in gross sales from 2009 to 2010. USCIS acknowledges that, according to the petitioner's tax returns, the petitioner has been losing less money since 2008, improving net income from \$(53,536.30) in 2008, to (\$6,779.66) in 2009, and (\$907.31) in 2010. But, according to its tax returns, the petitioner had still not returned to

profitability by the end of 2010. The petitioner has also failed to demonstrate its ability to pay the beneficiary's offered wage rate beyond 2007.

In its petition, the petitioner claimed that it employed 20 people. But, according to its tax returns, the amounts the petitioner has paid in salaries and wages have steadily decreased from \$97,763.44 in 2007, to \$77,453.70 in 2008, to \$57,491.20 in 2009, to \$24,131.20 in 2010. The monthly payroll records that the petitioner submitted also show that the petitioner paid the beneficiary for only 20 hours a week of work from January 2009 to March 2010. If the beneficiary were granted lawful permanent resident status on the basis of the petitioner's offer of employment, the petitioner would have to pay the beneficiary for full-time work as specified in the approved labor certification. *See also* 20 C.F.R. Sect. 656.10(c)(10)(requiring labor certification employer to attest that job opportunity is for "full-time, permanent employment").

The petitioner's failure to return to profitability more than two years after its business problems, its dwindling payroll, and its reduction in the beneficiary's hours of employment undermine its argument that it has financially recovered and is able to pay the beneficiary's offered wage rate. Unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not demonstrated an outstanding reputation in its industry that persuades USCIS that its business will financially recover. Moreover, as discussed above, because the petitioner must also demonstrate its ability to pay the wages of additional visa petition beneficiaries and has apparently not met its H-1B prevailing wage obligations to the beneficiary, USCIS finds that the circumstances in this case do not merit approval under *Sonegawa*.

In conclusion, the evidence submitted does not establish that the petitioner has 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.