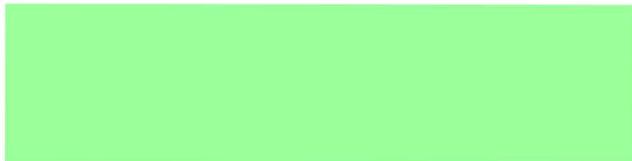




U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date:

Office: NEBRASKA SERVICE CENTER

FILE:

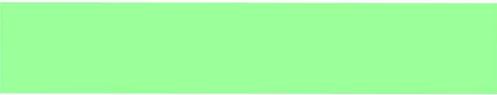


JUN 06 2012

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:

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 with the field office or service center that originally decided your case by filing a 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, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate planning group. It seeks to employ the beneficiary permanently in the United States as a senior planner/construction specialist. 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 March 10, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

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

(b)(6)

Here, the Form ETA 750 was accepted on December 2, 2002. The proffered wage as stated on the Form ETA 750 is \$67,038 per year. The Form ETA 750 states that the position requires a Master's degree in Urban/Town and Regional Land-use Planning and two years of experience in the job offered or in the related occupation, Construction Manager.<sup>1</sup>

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

On appeal, the petitioner submits copies of IRS Form W-2 which were issued to the beneficiary in 2001 and 2002; an undated letter from the beneficiary; and a letter dated April 29, 2009 from [REDACTED] President of [REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and currently to employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 19, 2002, the beneficiary claims to have worked for the petitioner since March 2001.

On appeal, the petitioner asserts that it paid a human resources and personnel company which supplied workers to the petitioner. The petitioner claims that the beneficiary was one of those workers and that this accounts for the seeming inability to pay the proffered wage in 2001, 2002 and 2003. The petitioner also asserts that it had the ability to pay the beneficiary as evidenced by the fact that it has always met its payroll obligations.

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>1</sup> Form ETA 750, Part A, Section 15 also indicates that the petitioner would accept a Bachelor's degree in addition to three years of experience in lieu of a Master's degree.

<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 supplied copies of IRS Form W-2 which it issued to the beneficiary in 2003, 2004, 2005, 2006, 2007 and 2008.<sup>3</sup> The beneficiary's IRS Forms W-2 show compensation received from the petitioner, as shown in the table below.

- For 2002, no petitioner-issued W-2 was provided.
- In 2003, the Form W-2 stated compensation of \$50,623.15.
- In 2004, the Form W-2 stated compensation of \$60,427.90.
- In 2005, the Form W-2 stated compensation of \$61,197.14.
- In 2006, the Form W-2 stated compensation of \$70,751.16.
- In 2007, the Form W-2 stated compensation of \$79,692.84.<sup>4</sup>
- In 2008, the Form W-2 stated compensation of \$73,061.52.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2002. The petitioner has demonstrated that it paid the beneficiary a portion of the proffered wage in 2003, 2004 and 2005. Further, the petitioner has demonstrated that it paid the beneficiary the full proffered wage in 2006, 2007 and 2008. Since the petitioner has not demonstrated that it paid the beneficiary any wages in 2002, it must still demonstrate the ability to pay the full proffered wage for that year. However, since the petitioner paid the beneficiary a portion of the proffered wage for 2003, 2004 and 2005, it must demonstrate the ability to pay the difference between the wages already paid and the full proffered wage, that difference being \$16,414.85 for 2003, \$6,610.10 for 2004 and \$5,840.86 for 2005.

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

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<sup>3</sup> The petitioner also provided copies of IRS Form W-2 which were issued to the beneficiary by Onvoi Business Solutions, Inc. in 2001, 2002 and 2003. These documents will be addressed later in the decision.

<sup>4</sup> The director erred in identifying the W-2 wages as \$76,812 for 2007 and \$71,141 for 2008. These figures do not reflect the income deferred by the beneficiary, and invested in a retirement account, identified in Box 12a (\$2,880 for 2007 and \$1,920 for 2008), which is designated as such by the use of Code D. See Instructions to IRS Form W-2, Wage and Tax Statement, 2010, <http://www.irs.gov/pub/irs-pdf/iw2w3.pdf> (accessed May 1, 2012).

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 record before the director closed on February 23, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax

return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2002, 2003, 2004 and 2005, as shown in the table below.

- In 2002, the Form 1120S stated a net loss<sup>5</sup> of \$31,639.00.
- In 2003, the Form 1120S stated net income of \$1,308.00.
- In 2004, the Form 1120S stated net income of \$35,736.00.<sup>6</sup>
- In 2005, the Form 1120S stated a net loss of \$15,612.00.

Therefore, for 2002, the petitioner did not demonstrate sufficient net income to pay the beneficiary the full proffered wage. For 2003 and 2005, the petitioner did not demonstrate sufficient net income to pay the difference between wages already paid and the full proffered wage. For 2004, the petitioner has demonstrated sufficient net income to pay the difference between the wages already paid and the full proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003 and 2005, as shown in the table below.

- In 2002, the Form 1120S, Schedule L stated net current assets of \$21,592.00.
- In 2003, the Form 1120S, Schedule L stated net current assets of \$20,462.00.

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<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 1, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions and other adjustments shown on its Schedule K for 2001 through 2007, the petitioner's net income is found on Schedule K of its tax returns.

<sup>6</sup> The director erroneously identified the net income for 2004 as \$40,302 and the net loss as \$12,742 for 2005 by not having considered Schedule K.

<sup>7</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.

- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$125.00.

Therefore, for 2002 the petitioner did not demonstrate sufficient net current assets to pay the beneficiary the full proffered wage. For 2005, the petitioner did not demonstrate sufficient net current assets to pay the beneficiary the difference between wages already paid and the full proffered wage. For 2003, the petitioner has demonstrated sufficient net current assets to pay the difference between wages already paid and the full proffered wage.<sup>8</sup>

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

On appeal, the petitioner asserts:

From 2001 through to the midway 2003 I outsourced all Human Resource and Payroll services to [REDACTED]. Although [the beneficiary] and all other employees worked under my direction at [REDACTED] offices all employees were technically under the employ of [REDACTED] has since gone out of business. I do not have the resources to get copies of their financials for the years 2001 – 2003. Due to this fact I included [REDACTED] financials for this period.

In support of these statements, the petitioner provided copies of IRS Form W-2 which were issued to the beneficiary by [REDACTED] in 2001, 2002 and 2003.

The petitioner's U.S. Income Tax Returns for an S Corporation (Form 1120S) for 2001, 2002, and 2003 do contain entries for "Other deductions," on Line 19. On Form 1120S, reference is made to Statement 2 for further explanation of those costs/expenses which comprise "Other deductions." The petitioner provided Statement 2 for 2001 and 2003 but not for 2002. According to Statement 2, the petitioner paid \$333,649 for "Payroll Expense-Leased Employees" in 2001 and \$72,711 for "Employee Leasing" in 2003.

While the petitioner's tax returns for at least 2001 and 2003 show sums which were paid for outsourced workers, the tax returns do not identify the source of those services. Further, the petitioner provided no documentary evidence, such as contracts, which might have demonstrated a relationship between the petitioning entity and the provider of personnel services. Moreover, the petitioner provided no invoices or manifests which might identify the names of workers which a personnel service was providing to it.

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<sup>8</sup> In his March 10, 2009 denial, the director did not find that the petitioner demonstrated the ability to pay for 2003, though he noted that the petitioner had already paid the beneficiary \$50,623 and was only liable for the difference between wages already paid and the proffered wage. In this case, the petitioner has shown sufficient net current assets to be able to pay the difference between the wages which it already paid to the beneficiary and the full proffered wage. Therefore, the director's determination regarding the ability to pay for the year 2003 is withdrawn.

The only evidence supplied in support of the petitioner's assertions consists of the W-2 statements which were issued to the beneficiary by [REDACTED]. These documents, alone, do not demonstrate that the petitioner paid [REDACTED] for the provision of the beneficiary's services. At the petitioner's own admission, the beneficiary was an employee of [REDACTED] or [REDACTED]. Indeed, USCIS records show that the beneficiary has a Form I-129, Petition for a Nonimmigrant Worker filed in his behalf by [REDACTED] for the period of time in question.<sup>9</sup>

On their own, the petitioner's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

With respect to the petitioner's deficiency in 2005, the petitioner asserts, "although the formula you use may state otherwise I have never failed to pay any of my employees their wages on time and in full."

Notwithstanding the petitioner's assertions, the W-2 statement which the petitioner issued to the beneficiary in 2005 shows wages paid of \$61,197.14 which is \$5,840.86 less than the proffered wage. Further, as has already been discussed, the petitioner provided neither sufficient net income nor sufficient net current assets in 2005 to pay the difference between the wages paid and the full proffered wage.

On appeal, the petitioner makes reference to a letter dated May 9, 2007 which was written by [REDACTED] CPA as attestation of the petitioner's claim to have always met its payroll obligations. This letter was provided with the petitioner's response to the director's January 14, 2009 request for evidence. In his letter, [REDACTED] states:

I am a Certified Public Accountant and have been preparing [REDACTED] tax returns from inception (1999) through the current tax year of 2006. During this period [REDACTED] has never missed a payroll.

While [REDACTED] asserts that the petitioner has never failed to make a payroll, he says nothing about the proffered wage in this matter and whether the petitioner has always had the ability to pay that amount. [REDACTED] does state "[REDACTED] has had the financial capability to cover [REDACTED] [sic] salary in all years employed." However, this statement does not identify the proffered wage or explain the reasoning and support for this determination.

Additionally, [REDACTED] states, "During the year 2002 [REDACTED] sustained a tax loss of approximately \$30,000. This loss resulted due to the cash method of accounting the company uses in preparing their tax returns. [REDACTED] had major receivables owned to them from their clients which were received and recorded as income in year 2003."

<sup>9</sup> [REDACTED] was filed by [REDACTED] for the beneficiary on November 20, 2000 and was approved on February 23, 2001 with validity dates of February 21, 2001 through October 1, 2003.

The petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed May 28, 2012). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.<sup>10</sup> The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS.

further states that there were also normal business lines of credit available to the corporation to handle any cash flow issues that may have resulted in the normal course of business.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5<sup>th</sup> ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from a line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner demonstrates eligibility under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Had completed an audit of the petitioner's finances during the relevant years, in accordance with Generally Accepted Accounting Principles and then set forth his findings in an auditor's statement, USCIS would have given such a document reasonable consideration. However, merely going on record without supporting documentary evidence does not satisfy 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)).

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<sup>10</sup> Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed May 28, 2012).

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the gross receipts, officer compensation and payroll have remained relatively consistent for the period of time under consideration. The petitioner has not established the historical growth of the business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within the industry or whether the beneficiary is replacing a former employee or outsourced services. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

It must be noted, at this point, that in the director's March 10, 2009 denial, he noted a discrepancy between the beneficiary's claim regarding his work experience, as set forth on Form ETA 750B, and statements made by the petitioner in response to the director's January 14, 2009 request for evidence.

On Form ETA 750B, the beneficiary claims to have worked for the petitioner since March 2001. On January 14, 2009, the director issued a request for evidence, asking the petitioner to supply among

other items, evidence of wages paid to the beneficiary in 2002 and onwards, such evidence taking the form of either IRS Form W-2 or 1099. In its response, the petitioner stated, "please note that the W-2s of the beneficiary for 2001/2 are not in his possession, and the past employer is defunct, so he could not obtain a copy." Since the petitioner indicated that the beneficiary was employed by another company in 2001 and 2002, contrary to what the beneficiary claimed on Form ETA 750B, the director noted that if the petitioner intended to appeal the decision, it would have to clarify the beneficiary's dates of employment and provide independent, objective evidence to corroborate the claims. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, the petitioner provided copies of IRS Form W-2 which were issued by [REDACTED] as well as a statement by the petitioner. According to the petitioner, from 2001 through the middle of 2003, all human resources and payroll services were outsourced to [REDACTED]. The petitioner states, "although [the beneficiary] and all other employees worked under my direction at [REDACTED] offices all employees were technically under the employ of [REDACTED]." The AAO has already addressed the deficiencies regarding the petitioner's claims respecting the utilization of outsourced services in our discussion of the petitioner's ability to pay and will, therefore, not repeat those here. The petitioner has not demonstrated that it specifically paid [REDACTED] for the provision of the beneficiary's services. However, the evidence does demonstrate that the beneficiary was employed and paid by [REDACTED] during 2001, 2002 and 2003. Therefore, the beneficiary's claimed beginning date of employment with the petitioner, as articulated on Form ETA 750B, is not correct. Nevertheless, the erroneous claim to have begun working for the petitioner in March 2001 does not have any adverse impact upon the beneficiary's satisfaction of the educational and experiential requirements set forth on Form ETA 750 and will, therefore, not be considered as a separate ground of ineligibility here.<sup>11</sup>

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.

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<sup>11</sup> The beneficiary corroborated his experiential qualifications with letters from other employers. The claimed employment with the petitioner was never utilized as a basis for eligibility in this matter, at least with respect to the requirements set forth on Form ETA 750, Section 14.