

(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: NOV 27 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:

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. Tomo
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 a tutoring center. It seeks to employ the beneficiary permanently in the United States as a tutor/instructor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's April 23, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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 November 6, 2002. The proffered wage as stated on the Form ETA 750 is \$34,950.00 per year. The Form ETA 750 states that the position requires an Associate's Degree in any field in addition to one year of experience in the job offered: tutor/instructor.

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.¹

On appeal, counsel submits a brief; copies of the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2002, 2003, 2004, 2005, and 2006; copies of bank statements from 2002, 2003, 2004, 2005, 2006, 2007, and 2008; copies of two Applications for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns (Form 7004); and a copy of an unsigned Settlement Agreement and Mutual Release.

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 1994² and currently to employ 30 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 1, 2002, the beneficiary claimed to have worked for the petitioner since November 2001.

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).

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

¹ 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).

² According to the petitioner's federal income tax returns, the petitioner was incorporated on May 19, 1999.

petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted copies of the Internal Revenue Service (IRS) Forms W-2, which it is issued to the beneficiary in 2002, 2003, 2004, 2005, and 2006 as well as copies of IRS Forms 1099, which it issued to the beneficiary in 2007 and 2008. The beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2002, 2003, 2004, 2005, and 2006 and IRS Forms 1099 for 2007 and 2008 show compensation received from the petitioner, as shown in the table below.

- In 2002, the Form W-2 stated compensation of \$18,059.00.
- In 2003, the Form W-2 stated compensation of \$25,440.00.
- In 2004, the Form W-2 stated compensation of \$28,174.00.
- In 2005, the Form W-2 stated compensation of \$22,500.00.
- In 2006, the Form W-2 stated compensation of \$24,000.00.
- In 2007, the Form 1099 stated compensation of \$29,500.00.
- In 2008, the Form 1099 stated compensation of \$22,500.00.

According to the evidence in the record, the petitioner has paid the beneficiary during each year from 2002 through 2008, but has never paid the beneficiary the full proffered wage. Therefore, the petitioner must still demonstrate the ability to pay the beneficiary the difference between the wages already paid and the full proffered wage, that difference being \$16,891 for 2002; \$9,510 for 2003; \$6,776 for 2004; \$12,450 for 2005; \$10,950 for 2006; \$5,450 for 2007; and \$12,450 for 2008.

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 (1st 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 record before the director closed on April 8, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2009 federal income tax return was not yet due. However, the petitioner’s income tax return for 2008 would have been due to be submitted to the IRS. Yet, the most recent income tax return submitted was for 2005. The petitioner also submitted a balance sheet for 2006. However, the balance sheet was prepared for the [REDACTED] and not for the petitioner.³ Further, the balance sheet was not audited.⁴

³ The [REDACTED] is another business entity owned by [REDACTED]. However, the [REDACTED] is a separate corporation with its own Federal Employer Identification Number (FEIN) and files its own federal income tax returns. 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.”

⁴ Counsel’s reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its

In the director's February 25, 2009 RFE, the director asked the petitioner to submit any IRS Forms W-2 or 1099 which it had issued to the beneficiary in 2002, 2003, 2005, 2007, and 2008. The director noted that, if the petitioner paid the beneficiary less than the proffered wage for any year, in particular 2006, 2007, or 2008, it should provide the federal income tax return for those years. In response, the petitioner submitted the requested evidence of compensation. However, the beneficiary was paid less than the proffered wage for each year in which compensation was provided. Therefore, the petitioner also submitted copies of its U.S. Income Tax Return for an S Corporation (Form 1120S) for 2002, 2003, 2004, 2005, and 2006. The petitioner also provided the U.S. Income Tax Return for an S Corporation for the [REDACTED] bearing the FEIN [REDACTED]. In his letter, which accompanied the petitioner's response to the director's RFE, counsel for the petitioner stated:

Enclosed is the following:

- Request for Evidence with Attachment
- Form G-28
- Copies of the Beneficiary's Forms W-2 or 1099 for the years 2002-2008
- Copies of the federal tax returns for the Petitioner from 2002-2007 (2008 has not been filed yet).

Thus, in his response, counsel for the petitioner claims to have submitted the petitioner's 2007 federal income tax return, only claiming that the 2008 return had not yet been filed. However, the tax return submitted in response to the director's RFE belongs to a different company, the [REDACTED] bearing a different FEIN and which was only established on January 19, 2005.

Now, on appeal, counsel for the petitioner claims that, as of the date of the appeal, neither the 2007 federal income tax return nor the 2008 federal income tax return have been prepared or submitted. Counsel states that the petitioner requested an extension from the IRS for both years and states that he is providing copies of the request for an extension with the appeal. However, on appeal, the petitioner provided two copies of Applications for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information, and Other Returns (Form 7004). Although counsel claims that one document is a request for an extension to file the 2007 federal income tax return and the other represents a request for an extension to file the 2008 federal income tax return, neither document corresponds with counsel's claims.

ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The first Form 7004, in Line 4a indicates that the application is for “calendar year 2006.” Further, the document bears no indication that it was submitted to or accepted by the IRS. Further, even if the petitioner submitted a request for a 6-month extension to file the 2007 federal income tax return, the return would have been due at least by the Fall of 2008, at least six months prior to the response to the director’s RFE. Further, the fact that counsel claimed to have submitted the petitioner’s 2007 federal income tax return with his response conflicts with the claims made on appeal and casts doubts upon the veracity of the petitioner’s assertions.

Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The same would apply to the petitioner’s claims regarding its 2008 federal income tax return. Normally, this return would have been due by early 2009. In the petitioner’s April 8, 2009 RFE response, however, counsel claimed that the 2008 federal income tax return had not yet been filed. On appeal, counsel claimed that the petitioner had filed a request for an extension and claims to have provided the request. However, the document submitted on appeal is not complete. The employer’s name on Form 7004 was completed by hand. However, the remainder of the form is incomplete. Part II in which the entity would identify a code which describes the type of tax return which the entity files, indicates Form Code 12 which is indicative of filing Form 1120. However, the petitioner is an S Corporation which files Form 1120S. This Form Code would be indicated by selecting Form Code 25. Further, Form 7004 does not contain any information regarding the year for which the extension is being requested. Moreover, the document bears no indication that it was submitted to or received by the IRS.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its 2007 and 2008 tax returns. The 2007 and 2008 tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner’s failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The most recent tax return submitted is 2006. The petitioner’s tax returns demonstrate its net income for 2002, 2003, 2004, 2005, and 2006, as shown in the table below.

- In 2002, the Form 1120S stated a net loss⁵ of \$32,840.00.
- In 2003, the Form 1120S stated a net loss of \$33,986.00.
- In 2004, the Form 1120S stated net income of \$39,304.00.
- In 2005, the Form 1120S stated net income of \$52,094.00.
- In 2006, the Form 1120S stated net income of \$6,135.00.
- For 2007, the petitioner provided no regulatory prescribed evidence of its net income.
- For 2008, the petitioner provided no regulatory prescribed evidence of its net income.

Therefore, for the years 2002, 2003, and 2006 the petitioner did not have sufficient net income to pay the difference between wages already paid and the full proffered wage. For 2007 and 2008, the petitioner did not demonstrate sufficient net income to pay the difference between wages already paid and the full proffered wage, as the petitioner provided no regulatory prescribed evidence of its net income for those two 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.⁶ 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 2006, as shown in the table below.

- In 2002, the Form 1120S, Schedule L stated net current liabilities of \$129,354.00.
- In 2003, the Form 1120S, Schedule L stated net current liabilities of \$186,437.00.
- In 2006, the Form 1120S, Schedule L stated net current liabilities of \$27,675.00.

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 18, 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 2002 and 2006, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

- For 2007, the petitioner provided no regulatory prescribed evidence of its net current assets.
- For 2008, the petitioner provided no regulatory prescribed evidence of its net current assets.

Therefore, for the years 2002, 2003, and 2006, the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage. For 2007 and 2008, the petitioner did not demonstrate sufficient net current assets to pay the difference between wages already paid and the full proffered wage because it provided no regulatory prescribed evidence of its net current assets for those years.

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, counsel asserts that USCIS should prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

On appeal, counsel also asserts that in the years 2002 and 2003 the petitioner suffered an unexpected financial loss due to a legal settlement, which the petitioner agreed to pay to one of its franchisees. According to the petitioner, it agreed to pay \$275,000.00 to the franchisee, and this sum represented a "one-time loss that affected the petitioner's tax returns for 2002 and 2003."

The petitioner provided a copy of the settlement agreement on appeal. The document does, in fact, contain a payment section, which indicates that the petitioner agreed to pay a franchisee the sum of \$275,000.00. However, the settlement also indicates that the petitioner may pay the sum of \$200,000.00 over time with interest paid at a rate of 7.75%. According to this lengthened payment method, the petitioner was required to make an initial payment of \$25,000.00 on November 15, 2002 and payments of \$3,000.00 per calendar month beginning on November 15, 2002. However, the settlement agreement is not signed by any of the parties involved in the suit, and there is no evidence in any of the petitioner's federal tax returns, in 2002, 2003, or in any subsequent return, showing payment of such settlement whether as a one-time payment or in monthly installments.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Thus, without evidence that the settlement was signed and agreed to and without evidence demonstrating that the petitioner paid out the sum, the petitioner had not demonstrated an unexpected adverse impact upon its business. Further, as the settlement agreement allows for the

payment of the settlement amount through installments over a long period of time, the sum is a long-term liability rather than a short-term liability. The petitioner has not demonstrated what impact, if any, the financial settlement would have had or did have upon the petitioner's financial situation.

On appeal, counsel asserts that in each year, the petitioner had sufficient cash in its bank accounts to pay the difference between wages already paid and the full proffered wage. Counsel's reliance on the balances in the petitioner's bank account 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.

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

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

In the instant case, the petitioner provided financial documentation for five years between 2002 and 2006. During that time, the petitioner's gross sales remained relatively consistent with payroll declining consistently. In addition, during the period, the petitioner reported either marginal net income or a net loss. The petitioner did not establish the historical growth of its business operation. Further, although the petitioner claims that it suffered an uncharacteristic business loss late in 2002 as a result of a legal settlement, the petitioner has not demonstrated a marked decrease in revenue corresponding with the \$275,000.00 legal settlement. Additionally, the petitioner has not established its reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

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.