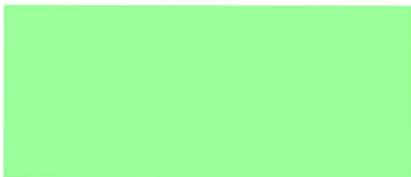




U.S. Citizenship
and Immigration
Services

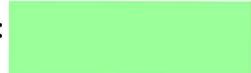
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DATE: **FEB 08 2013**

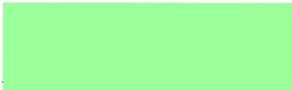
OFFICE: NEBRASKA SERVICE CENTER

FILE:



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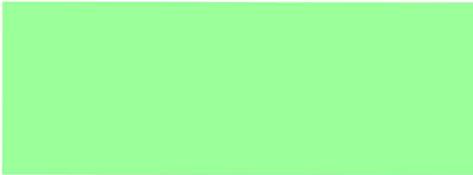
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel DiToro
FR

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director). The petitioner filed a motion to reopen and a motion to reconsider the director's decision. The director reopened and reaffirmed his decision to deny the petition and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of fire protection services. It seeks to employ the beneficiary permanently in the United States as a fire suppression system installer. 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 16, 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.

Section 203(b)(3)(A)(ii) of 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 October 8, 2002. The proffered wage as stated on the Form ETA 750 is \$35.93 per hour (\$74,734.40 per year based upon a 40-hour work week). The Form ETA 750 states that the position requires four years of experience in the job offered of fire suppression systems installer.

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; a copy of an unpublished administrative decision issued by this office; a graph detailing the annual revenue of [REDACTED] from 2002 through 2008; a copy of a personal banking statement/application submitted to Wells Fargo Bank; a letter dated July 15, 2009 from [REDACTED] president of [REDACTED] letter dated July 17, 2009 from [REDACTED] and an excerpt from *Accounting Research and Terminology Bulletins* (Final Edition 1961).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1974, to have a gross annual income of \$800,000.00, and currently to employ eight workers.² 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 October 1, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in neglecting to consider the totality of the petitioner's financial circumstances. Counsel asserts that, in 2002, the owner of the petitioning entity established a second company the costs of which detracted from the petitioner's profitability in 2002. Counsel claims that the director should have considered the personal assets of the petitioner's owner as being available for purposes of paying the proffered wage. Counsel asserts that the petitioner made a loan to its only shareholder and that, although the sum is identified as a long-term asset on the petitioner's balance sheet, the petitioner actually considers the loan to be a current asset.

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 The number has been corrected and is illegible.

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).

At the outset, it will be noted that the instant visa petition was filed by [REDACTED] using the Federal Employer Identification Number (FEIN) [REDACTED]. At the time of the initial filing, the record of proceeding contained a previously filed petition [REDACTED] which was submitted by [REDACTED] using the same FEIN. The record also contained, among other pieces of evidence, federal income tax returns submitted to demonstrate the petitioner's ability to pay. The petitioner submitted tax returns for two entities: [REDACTED]. The FEIN used by the petitioner of the instant visa petition is the same FEIN, which is used by and registered to [REDACTED]. Further, public records accessed through WestLaw, indicate that [REDACTED] is a fictitious name, which is registered to [REDACTED]. Indeed, documentation included in the record of proceeding confirms that the entity which filed the instant visa petition was, in fact, [REDACTED] and that this was the original company founded by the [REDACTED] family.

On February 17, 2009, the director issued a request for evidence (RFE), asking the petitioner to submit additional evidence of its ability to pay. However, in his request, the director noted that the tax returns were submitted by two companies and questioned their relationship to one another. On April 16, 2009, the director denied the instant Form I-140 petition and explained that USCIS could not consider the income reported by each company jointly as evidence of the petitioner's ability to pay because even though both companies shared a common owner, each remained a separate and distinct legal entity.

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."

Thus, in his denial, the director assessed the petitioner's ability to pay based upon the income reported on the U.S. Corporation Income Tax Returns (Form 1120), which were filed by [REDACTED]. Additionally, the director considered Internal Revenue Service (IRS) Forms W-2, which were issued by [REDACTED] to the beneficiary, although the record of proceeding contained IRS Forms W-2

and 1099, which were issued not only by [REDACTED] but also by [REDACTED] and [REDACTED] all of which shared the same business address.

On May 13, 2009, the petitioner filed a motion to reopen and a motion to reconsider the director's decision. The director reopened the denied petition, considered the evidence submitted with the motion, and then, on June 18, 2009, reaffirmed his decision to deny the petition. With the motion, the petitioner provided a letter from [REDACTED] which explained the formation of [REDACTED] as well as documents which were created contemporaneously with the establishment of this company. Additionally, the petitioner submitted federal income tax returns for [REDACTED] for the years 2005, 2006, 2007, and 2008 as well as federal income tax returns for [REDACTED] for the same years. Although the director did not provide an analysis of the documents provided with the motion, he accepted the petitioner's claim that both companies, [REDACTED] and [REDACTED] were related and considered the income from these entities jointly in his determination of the petitioner's ability to pay. Nevertheless, the director found that even using the federal income tax returns from both entities, the petitioner had still not demonstrated the ability to pay.

The AAO concurs with the director's finding that the petitioner has still not demonstrated the ability to pay. However, the AAO does not concur with his determination to combine the income from both [REDACTED]. The petitioner was established in 1974, having initially been owned by [REDACTED] the late husband of the current owner, [REDACTED]. Currently, the petitioner is owned by [REDACTED] but has one other corporate officer, [REDACTED]. The petitioner has its own FEIN, [REDACTED] and files its own federal income tax returns. According to the evidence supplied, [REDACTED] established [REDACTED] on April 20, 2000 to address a growing business need. In the motion, counsel for the petitioner stated that both entities share the same business address, the same overhead and employees, as well as the same clients. However, counsel also states that "they file separate tax returns..." Indeed, the petitioner has supplied federal income tax returns, which [REDACTED] filed in 2002, 2003, 2004, 2005, and 2006, each of which was filed using the FEIN, [REDACTED]. According to federal income tax returns, [REDACTED] is the owner of both entities. However, each entity has different corporate officers. Since at least 2000, [REDACTED] has been directed by [REDACTED]. [REDACTED] was directed by [REDACTED] from at least 2002 until 2007. In 2007, [REDACTED] [REDACTED] as a third officer and in 2008 [REDACTED] [REDACTED] was removed as a corporate officer, leaving [REDACTED] [REDACTED] as the remaining two officers.

For these reasons, the evidence indicates that [REDACTED] [REDACTED] are two separate and distinct legal entities. The petitioner, in this instance, is [REDACTED]. In assessing the petitioner's ability to pay, the AAO will only consider the ability to pay of [REDACTED] [REDACTED] Inc. as demonstrated through the financial documentation provided by this entity.

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 provided copies of IRS Forms W-2, which it issued to the beneficiary in 2002, 2003, 2004, 2005, 2006, 2007, and 2008 as well as IRS Forms 1099, which it issued to the beneficiary in 2004 and 2006.

It should also be noted that the petitioner submitted copies of IRS Forms W-2, which were issued to the beneficiary by [REDACTED] in 2005 and 2006, as well as IRS Forms 1099, which were issued to the beneficiary by [REDACTED] in 2006 and [REDACTED] in 2002, 2003, 2004, 2005, and 2006. Additionally, the petitioner submitted copies of IRS Forms 1099 which were issued to [REDACTED] in 2007 and 2008. Forms 1099 issued to [REDACTED] do not contain the name of the beneficiary but do contain the social security number which is registered to the beneficiary.

In any event, [REDACTED] are different companies with different Federal Employer Identification Numbers. Therefore, the AAO will not consider compensation paid by these entities as evidence of wages paid by the petitioner.

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."

Therefore, the beneficiary's IRS Forms W-2, Wage and Tax Statements, and IRS Forms 1099 show compensation received from the petitioner as shown in the table below.

- In 2002, Form W-2 shows compensation of \$25,548.78.
- In 2003, Form W-2 shows compensation of \$18,211.22.
- In 2004, Form W-2 and 1099 show combined compensation of \$18,872.00.
- In 2005, Form W-2 shows compensation of \$18,131.00.
- In 2006, Form W-2 and 1099 show combined compensation of \$8,449.20.
- In 2007, Form W-2 shows compensation of \$10,446.50.
- In 2008, Form W-2 shows compensation of \$16,379.00.

In the instant case, the petitioner never paid the beneficiary the full proffered wage in 2002 through 2008. Therefore, the petitioner must still demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage, that difference being \$49,185.62 in 2002, \$56,523.18 in 2003, \$55,862.40 in 2004, \$56,603.40 in 2005, \$66,285.20 in 2006, \$64,287.40 in 2007, and \$58,355.40 in 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the AAO closed on May 13, 2009 with the receipt by the director of the petitioner's motion to reopen and motion to reconsider with the associated evidence.³ As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for each year from 2002 through 2008, as shown in the table below.

- In 2002, the Form 1120 stated a net loss of \$23,001.00.
- In 2003, the Form 1120 stated a net loss of \$8,966.00.
- In 2004, the Form 1120 stated net income of \$3,374.00.
- In 2005, the Form 1120 stated net income of \$67,632.00.
- In 2006, the Form 1120 stated net income of \$68,081.00.
- In 2007, the Form 1120 stated net income of \$91,687.00.
- In 2008, the Form 1120 stated net income of \$18,705.00.

Therefore, for the years 2002, 2003, 2004, and 2008, the petitioner did not have sufficient net income to pay the difference between wages already paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end

³ In his February 17, 2009 RFE, the director requested that the petitioner submit the W-2 statements, which it issued to the beneficiary in 2007 and 2008. In his request, the director noted that, if the petitioner paid the beneficiary less than the proffered wage in either 2007 or 2008, it should also supply its federal income tax return for the relevant year. In its response, the petitioner supplied W-2 statements, which it issued to the beneficiary in 2007 and 2008 as well as IRS Forms 1099, which were issued by [REDACTED] an entity which is supposed to be operated by the beneficiary. Believing that this evidence satisfied the director's request, the petitioner did not submit its 2007 or 2008 federal income tax returns. The 2007 and 2008 income tax returns were then submitted with the motion to reopen and the motion to reconsider. Normally, these documents would not have been considered since they were requested in the director's RFE, but were not provided in the petitioner's response. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, the AAO will consider them because, based upon the director's request, the petitioner believed that the evidence supplied in its response satisfied the request and that the documents were, therefore, not required.

⁴ 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.

current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003, 2004, and 2008, as shown in the table below.

- In 2002, the Form 1120, Schedule L stated net current assets of \$42,166.00.
- In 2003, the Form 1120, Schedule L stated net current assets of \$33,891.00.
- In 2004, the Form 1120, Schedule L stated net current assets of \$20,287.00.
- In 2008, the Form 1120, Schedule L stated net current assets of \$251,403.00.

Therefore, for the years 2002, 2003, and 2004 the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage.

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

On appeal, counsel asserts that USCIS should consider the personal assets of the petitioner's owner, Lilit Marzbetuny, as being available to pay the proffered wage and that the ability to do so is supported by *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986) and even permitted by *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

Matter of Silver Dragon Chinese Restaurant represents a situation involving a petitioner who misrepresented the nature of the relationship between the beneficiary of the visa petition and the petitioner's owner, both of which turned out to be one and the same individual. Referencing the petitioner's reliance on *Matter of Aphrodite Investments, Ltd.*, the commissioner agreed that a beneficiary's ownership of a petitioning entity would not preclude the ability of the petitioner to hire the beneficiary since a corporation is a separate and distinct legal entity from its shareholder. The commissioner noted, however, that in instances in which a beneficiary is a shareholder of the petitioning entity, that fact must be disclosed to DOL for purposes of ascertaining whether the job offer was bona fide and genuinely open to U.S. workers. At no time did *Matter of Silver Dragon Chinese Restaurant* discuss whether the owner of the petitioner may utilize his or her personal assets for purposes of compensating alien beneficiaries. The beneficiary's ownership of the petitioning entity was scrutinized solely with a view to determining whether the job offer was bona fide and complied with the DOL regulations. Therefore, this decision does not support counsel's assertion.

Matter of Aphrodite Investments, Ltd. involves a situation in which a multinational company, headquartered in the United Kingdom, intended to relocate an individual to a subsidiary entity in the United States. The question at issue is whether the alien beneficiary could be said to have been employed by the company since he was a shareholder. The commissioner, citing *Matter of M-*, 8

I&N Dec. 24 (BIA 1958, A.G. 1958), determined that since a corporation is a separate and distinct legal entity from its shareholders, the petitioning corporation could, in fact, file a petition for an individual who was a shareholder. *Matter of Aphrodite Investments, Ltd.*, indeed, clarifies that corporations and their shareholders are not one and the same, but are legally separate. That is, shareholders, as individuals, are not held legally liable for the debts of the corporation. Conversely, therefore, USCIS does not consider the personal assets of shareholders when considering the corporation's ability to pay its potential employees because the shareholders have not legal obligation to do so.

On appeal, counsel asserts that the petitioning corporation made a loan in the amount of \$32,000.00 to its sole shareholder and that the director erred in neglecting to consider such a loan a current asset.

In the petitioner's response to the director's RFE, it included a letter from [REDACTED] CPA of [REDACTED]. In his letter, [REDACTED] stated, "also be advised that the owner of [REDACTED] has informed us that the loans from shareholders shown on Schedule L of the Company's tax returns are all due within one year and therefore should be included as current assets of the Company" (emphasis added). This letter did not refer to loans made by [REDACTED]. Further, the director found that, notwithstanding the claims made by [REDACTED] the petitioner provided no documentary evidence demonstrating any requirements that the loans made to shareholders be repaid within one year. The director further noted that the federal income tax returns for [REDACTED] included an amount for loans to shareholders on line 7 of Schedule L for 2002, 2003, and 2004, the figure remaining unchanged for all three years. In fact, the amount remained consistent through 2005 and only decreased in 2006. Nevertheless, the fact that the petitioner provided no documentation identifying the terms of the loan and included the amount of the loan on line 7 of Schedule L, thereby indicating that the sum was not a current asset, the director did not consider the amount of the loan in his calculation of the petitioner's net current assets.

On appeal and in its earlier motion, counsel asserts that the sum should be considered a current asset and includes letters from [REDACTED] CPA, making the same claim. Additionally, in both the instant appeal and in the earlier motion, counsel for the petitioner makes reference to a promissory note in which [REDACTED] indicated that it was intended that the loan be repaid within one year. [REDACTED] stated that, under "accepted accounting principles," current assets are those "which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business" and that it was the reasonable expectation of both the petitioner and [REDACTED] that the loan be repaid within a year.

The IRS addresses various matters related to payment of corporate officers and paying employees of corporations on its web site. Under a section entitled, "Paying Yourself," the IRS includes a description of loans to shareholders under the heading "Shareholder loan or officer's compensation?"⁵ According to the IRS:

⁵ See <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Paying-Yourself#6> (accessed September 26, 2012).

A loan by a corporation to a corporate officer should include the characteristics of a loan made at arm's length. That is, there should be a contract with a stated interest rate, a specified length of time for repayment, and a consequence for failure to repay the loan. Collateral would also be an indication of a loan. A below-market loan is a loan which provides for no interest or interest at a rate below the federal rate that applies. If a corporation issues you, as a shareholder or an employee, a below-market loan, the lender's payment to the borrower is treated as a gift, dividend, contribution to capital, payment of wages, or other payment, depending on the substance of the transaction.

According to the IRS, loans made to shareholders should include contracts enumerating the terms of the loan and penalties for failure to repay. Counsel for the petitioner made repeated reference to a promissory note, which [REDACTED] signed. However, the petitioner provided no such document with its initial petition submission, its response to the director's RFE, its motion to reopen and motion to reconsider, or the instant appeal. 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)). Further, the assertions of counsel 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 1980).

Without such evidence, and considering the fact that the petitioner reported the loan made to its shareholder on line 7 of Schedule L, the evidence indicates that such a loan is a long-term, as opposed to a current, asset. The petitioner reported the loan to the IRS as such in its federal income tax returns and may not now re-designate the funds as current assets. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

On appeal, counsel asserts that the director erred in failing to consider the totality of the petitioner's financial circumstances. Namely, counsel asserts that the petitioner established [REDACTED] Inc. in 2002 and that the funds required to establish the second company detracted from the petitioner's profitability in 2002.

However, the documents provided as evidence (e.g., Stock Certificate and ledger, federal income tax returns, etc.) as well as public records contained both in the database maintained by the California Secretary of State, Business Entities Division, and as accessed in WestLaw show that [REDACTED] was established on April 20, 2000 not in 2002. 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).

Therefore, the petitioner has not demonstrated an impact, adverse or otherwise, which the creation of a second company had upon the petitioner's profitability and which corresponds with the

establishment of [REDACTED]. Further, the petitioner has stated that [REDACTED] Inc. shares the business premises, overhead, clientele, and personnel with [REDACTED]. The petitioner states that the development of [REDACTED] was brought about to "expand the scope of [REDACTED] to include installation, maintenance and certification of the fast changing fire suppression systems that required experienced installers and affiliations" for purposes of meeting the demand of "a burgeoning industry." The petitioner goes on to state, "to respond to the regulatory demands, grow, and remain competitive in the markets, PC initiated to recognize and expand the firm's business opportunities." The purpose of developing a second entity was to establish two successful companies, each addressing different aspects of the industry. The petitioner has provided no documentary evidence, which demonstrates any expenditures related to the establishment of the second company. Further, the second company, though sharing premises, personnel, overhead, and clientele with the petitioner, is a separate and distinct legal entity. The petitioner has not demonstrated that the petitioner, as a corporation, was responsible for the establishment of the second company. Therefore, any funds, which might have been expended to initiate the operation, would have derived from the owner of the petitioning entity. Further, the second company does not represent an expansion of the petitioning entity, but the establishment of a completely new and different entity.

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 \$100,000.00. 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 couturière. 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 did not have sufficient net income or net current assets to pay the difference in wages paid and the proffered wage for 2002 through 2004. The petitioner has not demonstrated the historical growth of its business operation, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.