

(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: FEB 28 2013

OFFICE: TEXAS 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:
[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner owns and manages retail stores, including dry cleaners.¹ It seeks to employ the beneficiary permanently in the United States as an accountant. 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 failed to establish 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 November 10, 2010 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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,

¹ According to Internal Revenue Service (IRS) Forms W-2 and bank account statements in the record, the petitioner does business as [REDACTED]

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, 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 March 24, 2005. The proffered wage stated on the form is \$52,200 a year. The position requires a Bachelor's degree in business administration, accounting, finance or a related field, according to the approved labor certification. No employment experience is required.

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.²

The evidence in the record shows that the petitioner is structured as an S corporation. In its petition, the petitioner stated it was established in 1999 and employs four 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, which the beneficiary signed on March 23, 2005, the beneficiary stated that he had worked for the petitioner in the offered position since March 2003.³

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered

² 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).

³ On the beneficiary's Form G-325A, Biographic Information, which he submitted in October 2007 with his application for adjustment of status, the beneficiary stated that he has worked for the petitioner in the offered position since June 2000. Letters from the beneficiary and the petitioner's president also state that the beneficiary has worked for the petitioner since 2000. In addition, United States Citizenship and Immigration Services (USCIS) records show that the petitioner has received H-1B visa petition approvals to employ the beneficiary since 2000. Because the offered position does not require any employment experience and because the record shows that the beneficiary's Bachelor's degree was awarded before the earliest date he claims to have begun working for the petitioner, the beneficiary's start date in the offered position, while unclear, is not a material fact in the adjudication of this petition.

wages. USCIS will also consider the totality of the circumstances affecting the petitioning business. *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 petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted copies of IRS Forms W-2, showing that it employed the beneficiary from 2005 to 2009. The W-2 forms show that the petitioner paid the beneficiary: \$20,000 in 2005; \$39,000 in 2006; \$42,165 in 2007; \$21,000 in 2008; and \$45,840 in 2009. Because none of these annual amounts equal or exceed the annual offered wage of \$52,200, the petitioner has not demonstrated its ability to pay based on wages it has paid the beneficiary.

Moreover, the AAO finds that the amounts on the petitioner's W-2 forms are not credible because they conflict with amounts on the petitioner's federal tax returns. For example, the beneficiary's 2006 W-2 form shows that the petitioner paid him \$39,000 that year. But the petitioner's 2006 tax return indicates that it did not pay any salaries or wages that year. *See* line 8 of the petitioner's IRS Form 1120S for 2006. Similarly, on its 2005 and 2007 tax returns, the petitioner claimed annual salary and wage amounts of \$14,991 and \$13,500, respectively, while the beneficiary's W-2 forms for the corresponding years indicate he earned \$20,000 and \$42,165, respectively.

The petitioner's tax returns indicate that it paid compensation to officers sufficient to include the beneficiary's W-2 wages in 2005, 2006 and 2007. The petitioner's returns show that it paid officer compensation of \$20,000 in 2005, \$54,000 in 2006 and \$53,915 in 2007. *See* line 7 of the petitioner's IRS Form 1120 for 2006. But, in a July 15, 2010 letter that the petitioner submitted to USCIS, the beneficiary stated that "[I]n no way was [he] ever a part of management for [the petitioner] in the 10 years [he] ha[s] been employed with them." Therefore, based on the beneficiary's statement, the petitioner's annual officer compensation amounts would not include the beneficiary's annual wages.

Because the beneficiary's annual wage amounts on his 2005, 2006 and 2007 W-2 forms indicate that he received more than the petitioner's tax returns show it paid in total wages for those years, the AAO finds that the W-2 form amounts are not credible. The petitioner has not explained the discrepancies between the amounts on its W-2 forms and its tax returns. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (the petitioner must resolve inconsistencies with independent, objective evidence). In addition, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Id.*, at 591. The AAO therefore finds that the petitioner has failed to demonstrate its ability to pay the offered wage based on the wages it paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figures reflected on the petitioner's federal income tax returns. If an annual net income amount on the

petitioner's tax return (or if the annual net income amount combined with wages that the petitioner paid the beneficiary in that year) equals or exceeds the annual offered wage, then the petitioner will generally have demonstrated its ability to pay the offered wage for that year.

USCIS considers annual net income amounts without including depreciation or other expenses. See *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 July 19, 2010, with his receipt of the petitioner’s submissions in response to his request for evidence. As of that date, the petitioner’s 2010 federal income tax return was not yet due. Therefore, the petitioner’s tax return for 2009 is the most recent return in the record.

The petitioner’s tax returns show the following annual net income⁴ amounts: \$12,467 in 2005; \$31,313 in 2006; \$11,615 in 2007; \$15,683 in 2008; and \$14,677 in 2009. None of these annual income amounts equals or exceeds the annual offered wage of \$52,200. Because the AAO has found the wage amounts on the beneficiary’s W-2 forms to be unreliable, the AAO will not combine those annual wage amounts with the petitioner’s corresponding annual net income amounts to determine whether the petitioner has the ability to pay the offered wage.

Even if the AAO found the wage amounts on the beneficiary’s W-2 forms to be credible, their combination with the petitioner’s annual net income amounts would not demonstrate the petitioner’s continuing ability to pay the offered wage over the entire period since the 2005 priority date. The sums of the annual income amounts and the W-2 wages the petitioner paid to the beneficiary in 2006 (\$31,313 + \$39,000), 2007 (\$11,615 + \$42,165), and 2009 (\$14,677 + \$45,840) would exceed the annual offered wage. But the sums of the petitioner’s annual net income amounts and the W-2 wages it paid the beneficiary in 2005 (\$12,467 + \$20,000) and 2008 (\$15,683 + \$21,000) would not equal or exceed the annual offered wage. Therefore, even if the AAO found the W-2 amounts to be credible, an examination of the petitioner’s net income and the beneficiary’s wages would not demonstrate the ability to pay the offered wage in 2005 and 2008.

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

⁴ 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 Schedule K at line 17e for 2005 and at line 18 since 2006. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 7, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner did not adjust the net income amounts on its Schedules K for 2005 through 2009, the petitioner’s net income is found on Forms 1120S, Lines 21, of its tax returns. (The petitioner’s tax returns from 2005 through 2009 reflect depreciation adjustments on their Schedules K at lines 15a, but they do not record adjusted net income amounts at line 17e for 2005 and lines 18 since 2006.)

petitioner's current assets and current liabilities.⁵ 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 year-end 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 show the following year-end net current asset amounts: \$(11,335)⁶ in 2005, reflecting \$(10,413) in current assets less \$922 in current liabilities; \$(9,697) in 2006, reflecting \$(8,457) in current assets less \$1,240 in current liabilities; \$3,633 in 2007, reflecting \$5,503 in current liabilities less \$1,870 in current liabilities; and \$(756) in 2008, reflecting \$1,446 in current assets less \$2,202 in current liabilities.⁷ The petitioner's annual net current asset amounts for 2005 through 2008 do not equal or exceed the annual offered wage of \$52,200. The petitioner has therefore not demonstrated its ability to pay the offered wage based on its net current assets.

In addition, because the petitioner's annual net current asset amounts for 2005 and 2008 were negative, the petitioner cannot demonstrate its ability to pay the offered wage in 2005 and 2008 based on its net current assets, even if the AAO found the beneficiary's W-2 wage rates credible and combined them with the net current asset amounts.

Therefore, from the date the DOL accepted Form ETA 750 for processing, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage based on examinations of the wages it paid the beneficiary, its net income, and its net current assets.

On appeal, counsel asserts that the petitioner must demonstrate its ability to pay only the pro-rated annual offered wage amount of \$39,150 in 2005. Because the petition's priority date is March 24, 2005, counsel argues that the petitioner is not required to demonstrate its ability to pay the portion of the offered wage before March 24, 2005.

⁵According 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.

⁶Numbers in parentheses reflect negative amounts.

⁷The copy of Schedule L of the petitioner's IRS Form 1120S for 2009 contains no financial information. The petitioner reported less than \$250,000 in revenues that year, according to the form. Although the petitioner's Form 1120S for 2009 does not indicate a total asset amount, the petitioner's forms from previous years report total annual asset amounts of well below \$250,000. The petitioner therefore may not have been required to complete Schedule L in 2009. See www.irs.gov/pub/irs-pdf/f1120s.pdf, p. 2 (if corporation indicates total annual receipts of less than \$250,000 and total annual assets of less than \$250,000 in response to Schedule B, question 10, then the corporation is not required to complete Schedule L) (accessed on February 15, 2013).

Although the director cited the pro-rated 2005 offered wage amount of \$39,150 in his decision, USCIS does not generally allow pro-rating of an annual offered wage. USCIS will not allow a petitioner to use 12 months of income to establish its ability to pay only eight months of the annual proffered wage, just as it would not allow a petitioner to use two years of income to establish its ability to pay the annual proffered wage. USCIS will prorate a proffered wage only if the record contains evidence (such as monthly income statements or pay stubs) that the petitioner received the net income or paid the beneficiary's wages during the portion of the year after the priority date. Here, the petitioner has not submitted evidence that it received its 2005 net income or paid the beneficiary his 2005 wages after March 24, 2005. The AAO will therefore not prorate the petitioner's annual offered wage for 2005. The AAO finds that the director erred in citing a pro-rated 2005 offered wage amount in his decision. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001) (the AAO is not bound to follow contradictory decisions of service centers).

Counsel also argues that, although the beneficiary's W-2 forms show that the petitioner paid him wages of \$20,000 in 2005 and \$21,000 in 2008, the petitioner actually paid the beneficiary \$33,787 in 2005 and \$34,002 in 2008. Counsel asserts that the petitioner paid the additional \$13,787 of 2005 compensation and the additional \$13,002 of 2008 compensation to the beneficiary in the form of living expenses and bonuses. The petitioner's tax preparer misclassified the additional compensation amounts as "management fees" on the petitioner's 2005 and 2008 tax returns, according to counsel.

In support of this claim, the petitioner submitted its 2005 tax return, which, in Statement 02 of IRS Form 1120S, indicates \$13,787 in "management fees" among its "Other deductions." See line 19 of the petitioner's IRS Form 1040 for 2005, referring to "Statement #2." Similarly, Statement #2 in the petitioner's 2008 tax return reflects "management fees" of \$13,002. See line 19 of the petitioner's IRS Form 1040 for 2008. A December 9, 2009 letter from the petitioner's president and the July 15, 2010 letter from the beneficiary also support the petitioner's claim that it paid additional compensation to the beneficiary in 2005 and 2008 in the form of "management fees."

But evidence that the petitioner submitted in support of its first immigrant visa petition for the beneficiary contradicts the petitioner's current claim.⁸ An August 1, 2007 letter from an accountant that prepared the petitioner's 2005 tax return states that, in addition to the \$20,000 in W-2 wages that the petitioner paid the beneficiary in 2005, the petitioner paid him compensation of \$32,300, including \$10,000 in "management fees," \$10,000 in "living expenses," and a \$12,300 "bonus." In an August 9, 2007 letter, the petitioner's president also cited the beneficiary's additional 2005 compensation as \$32,300, contradicting his more recent statement that the additional compensation totaled only \$13,787.

The petitioner also previously submitted a July 19, 2009 letter from an accountant who prepared the beneficiary's personal tax returns. The accountant stated that the beneficiary received total annual

⁸ USCIS records show that USCIS also denied the petitioner's first immigrant petition on behalf of the beneficiary for failure to establish the ability to pay the offered wage. See [REDACTED] Both petitions were for the same job opportunity. *Id.*

income amounts of \$42,787 in 2005, \$54,656 in 2006, \$53,780 in 2007 and \$41,751 in 2008. She also stated that the beneficiary's employment by the petitioner was his "only source of income."

The record, however, contains copies of the beneficiary's federal income tax returns for 2005, 2007 and 2008, which contradict the accountant's statements. The beneficiary's 2005 tax return shows total annual income of \$33,925, not \$42,787 as the accountant stated. Also, contrary to the accountant's statement that the beneficiary's employment by the petitioner was his "only source of income," the beneficiary's tax returns show that he received rental income totaling more than \$18,000 in 2007 and 2008, as well as income from "tax refunds, credits or offsets" in 2005 and 2008.

Consistent with the petitioner's current claim, the beneficiary declared \$13,787 in "management fees" as "other income" in his 2005 tax returns. *See* line 21 of the beneficiary's IRS Form 1040 for 2005. But the beneficiary's 2008 Form 1040 does not list any "other income" or "management fees," even though the beneficiary stated in his July 15, 2010 letter that he also received "management fees" in 2008 and that he reported all his income from the petitioner to the IRS.

Finally, the copy of the beneficiary's 2005 tax return indicates that the accountant signed and dated it on November 12, 2009, more than three years after it was due. The date of the return and the fact that its total annual income amount differs from the amount the accountant cited in the first petition suggests that this more recent return might be an amended return. But the IRS generally requires amended individual returns to be filed on IRS Form 1040X within three years of the date of the original return. *See* IRS information on "Amended Returns" at www.irs.gov/taxtopics/tc308.html (accessed February 8, 2013). The beneficiary's 2005 return that the petitioner submitted does not contain an IRS Form 1040X and is dated more than three years after the original return was due. The return also does not contain evidence that it was actually submitted to the IRS.

The contradictions and inconsistencies in the petitioner's financial documents undermine the credibility of its claim of paying additional compensation to the beneficiary in 2005 and 2008. The petitioner has not explained the discrepancies between the evidence in its two petitions for the beneficiary. *See Ho*, 19 I&N Dec. at 591-592 (the petitioner must resolve inconsistencies with independent, objective evidence). In addition, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Id.*, at 591. The AAO therefore finds that the petitioner has failed to establish that it paid additional compensation to the beneficiary in 2005 and 2008. The AAO also notes that, even if the petitioner established that it paid the beneficiary totals of \$33,787 in 2005 and \$34,002 in 2008, those annual compensation amounts, combined with the petitioner's corresponding net income amounts of \$12,467 in 2005 and \$15,683 in 2008, would still not equal or exceed the annual offered wage of \$52,200.

Counsel asserts that the petitioner carried monthly bank account balances of at least \$2,500 during 2008. The petitioner provides copies of its 2008 monthly bank statements as evidence of its ability to pay the remaining \$2,515 that would be needed to reach the offered wage in 2008 after combining the beneficiary's claimed \$34,002 in wages and the petitioner's 2008 annual net income amount of \$15,683.

Notwithstanding the AAO's findings that the petitioner has failed to establish that it paid the beneficiary \$34,002 in 2008, counsel's reliance on the monthly balances in the petitioner's bank account to show the petitioner's ability to pay the remainder of the beneficiary's 2008 offered wage is misplaced. First, bank statements are not among the three types of evidence (annual reports, federal tax returns or audited financial statements) required to demonstrate a petitioner's ability to pay a proffered wage. *See* 8 C.F.R. § 204.5(g)(2). While the regulation allows additional material "in appropriate cases," the petitioner in this case has not explained why the documentation the regulation specifies is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. *Id.* In addition, the petitioner did not submit evidence to demonstrate that the funds reported on the petitioner's bank statements represent additional available funds that the petitioner's tax returns did not reflect in its income amounts, or in the cash specified on Schedule L that USCIS considered in determining the petitioner's net current assets.

Counsel also argues that the petitioner's president and sole owner stated that he would "transfer any amount necessary" from his personal assets to pay the offered wage rate and had the ability to pay the offered wage since the 2005 priority date. The petitioner submitted a "Personal Financial Statement" of the president/owner, showing that he has almost \$1.5 million more in assets than in liabilities.

The pledge of the petitioner's president/owner is insufficient to demonstrate the petitioner's ability to pay the offered wage. Notwithstanding that the "Personal Financial Statement" is unaudited and indicates that the bulk of the president/owner's assets constitutes real estate, which cannot be readily liquidated, USCIS cannot consider the assets of a corporation's shareholders (or of other enterprises or corporations) in determining the corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). A corporation is a separate and distinct legal entity from its owners and shareholders. *Id.* As the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "[N]othing 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." The petitioner therefore cannot use the pledge of its president and sole owner to demonstrate its ability to pay the offered wage.

Finally, counsel urges USCIS to exercise its discretion and consider other factors affecting the petitioner's business in determining its ability to pay the offered wage.

As indicated previously, 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 Sonogawa*, 12 I&N Dec. at 612. The petitioning entity in *Sonogawa* had been in business for more than 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 its old and new locations for five months. It incurred large moving costs and could not conduct regular business for a period of time. The Regional Commissioner, however, determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included

Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of its 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 its business, its overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, and whether the beneficiary is replacing a former employee or an outsourced service.

In the instant case, the petitioner, like the petitioner in *Sonegawa*, has been in business for more than 10 years. According to its tax returns, the petitioner's gross sales increased annually from 2005 to 2008 before dipping in 2009. Besides showing no salaries paid in 2006, the petitioner's tax returns otherwise indicate growth in its annual wage expenses. Unlike the petitioner in *Sonegawa*, however, the petitioner in the instant case has not established the occurrence of any uncharacteristic business expenditures or losses that prevented it from demonstrating its ability to pay the offered wage. Counsel argues and the petitioner's president states in his December 9, 2009 letter that the economic recession caused by the global financial crisis of 2008 hurt the petitioner's revenue stream in 2008. But the petitioner failed to submit any evidence to corroborate the statement of its president. See *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) (going on record without supporting documentary evidence is insufficient for purposes of meeting the burden of proof in these proceedings). Moreover, the petitioner's tax returns contradict the president's statement, showing that the petitioner's 2008 annual revenues exceeded all other corresponding amounts from 2005 through 2009. In addition, as previously discussed, the contradictions and inconsistencies in the petitioner's evidence raise material doubts about the petitioner's financial documentation and its credibility. Therefore, considering the totality of the circumstances in accordance with *Sonegawa*, the AAO finds that the petitioner has failed to demonstrate the continuing ability to pay the offered wage since the priority date.

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.