



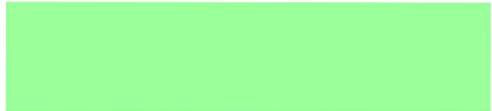
U.S. Citizenship
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Services

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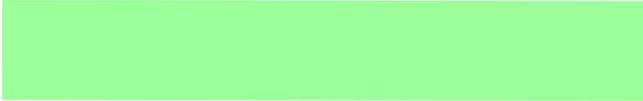


DATE: OFFICE: NEBRASKA SERVICE CENTER

JUN 21 2013

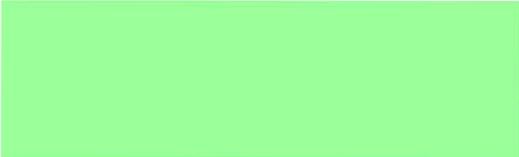


IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Chinese specialty. 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 14, 2009 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on March 18, 2002. The proffered wage as stated on the Form ETA 750 is \$2,000 per month (\$24,000.00 per year).

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

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 1993 and to currently employ 7 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 March 10, 2002, the beneficiary did not claim to have worked for the petitioner.

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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2002 or subsequently.

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

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).

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).

On September 4, 2012, the AAO issued a Notice of Intent to Dismiss and Derogatory Information and Request for Evidence to the petitioner (NOID). The NOID stated that according to the State of Oregon Secretary of State website, the petitioner was administratively dissolved on August 12, 2011. The NOID instructed the petitioner to demonstrate its continued existence, operation, and good standing. The NOID also requested the petitioner to submit its annual reports, federal tax returns or

audited financial statements for 2008 to 2011.² In response to the NOID, the petitioner submitted its federal tax returns for 2002, 2003, 2004, 2005, 2006, 2007 and 2011. The petitioner failed to submit its annual reports, federal tax returns or audited financial statements for 2008, 2009 and 2010. 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).

Also, in response to the AAO's NOID, the petitioner submitted the 2011 federal tax return for [REDACTED]. The petitioner asserts that it changed its name in 2011 from [REDACTED] to [REDACTED]. However, contrary to the petitioner's assertion, the petitioner did not simply change its name. The petitioner's corporate existence in Oregon was dissolved in 2011, and the two shareholders of the petitioner, [REDACTED] organized a separate and distinct Oregon limited liability company, [REDACTED] on February 17, 2011.³ A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Since [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor.⁴ Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.⁵

² The record of proceeding contains the petitioner's federal tax returns for 2002 to 2007. The petitioner also submitted unaudited financial statements for 2007 and 2008. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its 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.

³ [REDACTED] has a different federal employer identification number than the petitioner.

⁴ Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. The petitioner did not submit any evidence of a transfer of assets from [REDACTED]. Since the 2011 federal tax return for [REDACTED] indicates that it covers the period from March 1, 2011 to December 31, 2011, the AAO will assume for purposes of this analysis that the transfer occurred on March 1, 2011.

⁵ In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial*

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

The petitioner's tax returns demonstrate its net income for 2002, 2003, 2004, 2005, 2006, 2007, and 2011, as shown in the table below.

- In 2002, the Form 1120S stated net income⁶ of -\$8,296.00.
- In 2003, the Form 1120S stated net income of -\$1,007.00.
- In 2004, the Form 1120S stated net income of \$524.00.
- In 2005, the Form 1120S stated net income of \$11,375.00.
- In 2006, the Form 1120S stated net income of -\$1,952.00.
- In 2007, the Form 1120S stated net income of \$2,010.00.
- In 2011, the Form 1120S stated net income of -\$2,402.00.

Therefore, for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and for the period from January 1, 2011 to February 28, 2011, the petitioner did not establish that it had sufficient net income to pay the proffered wage.⁷

The 2011 Form 1120S for [REDACTED] stated net income of \$1,549.00.⁸ Therefore, [REDACTED] did not have sufficient net income to pay the proffered wage for the period from March 1, 2011 to December 31, 2011.

Auto, 19 I&N Dec. at 482.

⁶ 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 (2002-2003), 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 June 11, 2013) (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 deductions shown on its Schedule K for 2007, the petitioner's net income is found on Schedule K of its 2007 tax return. For 2002, 2003, 2004, 2005, 2006 and 2011, the petitioner's net income is shown on line 21 of page one of its tax returns.

⁷ The petitioner failed to submit its annual reports, federal tax returns or audited financial statements for 2008, 2009 and 2010.

⁸ [REDACTED] is an Oregon limited liability company taxed as an S corporation. Because [REDACTED] had additional deductions shown on its Schedule K for 2011, its net income is found on Schedule K of its 2011 tax return.

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.⁹ 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, 2004, 2005, 2006, 2007 and 2011, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$43,020.00.
- In 2003, the Form 1120S stated net current assets of \$1,483.00.
- In 2004, the Form 1120S stated net current assets of \$5,872.00.
- In 2005, the Form 1120S stated net current assets of \$12,186.00.
- In 2006, the Form 1120S stated net current assets of \$12,938.00.
- In 2007, the Form 1120S stated net current assets of \$19,876.00.
- In 2011, the Form 1120S did not state the petitioner's net current assets.¹⁰

Therefore, for the year 2002, the petitioner had sufficient net current assets to pay the proffered wage. For the years 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010 and for the period from January 1, 2011 to February 28, 2011, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

In 2011, Schedule L to the Form 1120S for [REDACTED] was not required to be completed, and [REDACTED] did not submit any other regulatory-prescribed evidence to establish its net current assets for 2011. Thus, [REDACTED] did not establish that it had sufficient net current assets to pay the proffered wage for the period from March 1, 2011 to December 31, 2011.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it or its purported successor 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.

⁹According 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.

¹⁰ Schedule L to IRS Form 1120S is not required to be completed if the corporation's total receipts for the tax year and its total assets at the end of the tax year are less than \$250,000. See <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 11, 2013). The petitioner did not submit any other regulatory-prescribed evidence to establish its net current assets for 2011.

Counsel advised on appeal that the beneficiary will replace the petitioner's shareholders as cook. Counsel states that the shareholders, [REDACTED] want to reduce their hours cooking at the restaurant and make some progress toward retirement. He states that the shareholders are the sole cooks at the restaurant and average a combined total of over 70 hours per week cooking.¹¹ In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In the instant case, the director issued a request for evidence to the petitioner dated January 20, 2009 (RFE).¹² The RFE requested, in part, that the petitioner submit detailed evidence showing how the departures and retirements of workers relate to the replacements, such as affidavits from departed or retiring workers and a business plan with pro forma financial projections. The director noted that the evidence regarding this issue must be detailed and persuasive. In response to the director's RFE, the petitioner submitted a letter dated June 17, 2005 from [REDACTED] stating that the two shareholders "will not be taking payroll to offset the increase in payroll for the new cooks." The petitioner did not submit any additional evidence in response to the RFE regarding the replacement of workers. On appeal, the petitioner submits an affidavit of one of its shareholders, [REDACTED] dated June 16, 2009 regarding the replacement of workers. However, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted affidavit to be considered, it should have submitted the document in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the replacement evidence submitted on appeal.

Counsel also submits the petitioner's bank statements on appeal. However, 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 for 2002, 2003, 2004, 2005, 2006, 2007 and 2011, such as

¹¹ With the petition, the petitioner submitted an affidavit dated May 21, 2007 from [REDACTED] manager of the petitioner, indicating that her husband, [REDACTED], worked as a cook for the petitioner and wanted to leave to work in his own business. Counsel does not reference [REDACTED] on appeal.

¹² On appeal, counsel asserts that the director did not issue an RFE in this case. This assertion is without merit.

the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also asserts that the assets of the petitioner's shareholders should be considered in the determination of the petitioner's ability to pay the proffered wage. On appeal, the petitioner submits the affidavit of one of its shareholders, [REDACTED], dated June 16, 2009, stating that she and her husband individually own the building where the petitioner does business, and that they lease it to the petitioner. She states that their present equity in the building is "far in excess of \$1,000,000" and that they currently owe \$70,000 on the property.¹³ However, 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, the shareholders' personal assets will not be considered in the determination of the petitioner's ability to pay the proffered wage.

[REDACTED] also states that she and her husband have made personal loans to the petitioner when necessary to ensure adequate cash flow. However, the petitioner has not documented the terms of the loans with promissory notes or loan agreements. 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, if the funds loaned by the shareholders were used for another purpose by the petitioner, they may not have been available to pay the wage.

In addition, [REDACTED] states that she and her husband have ample ability to supplement the petitioner's income, if necessary, by ending their officers' salaries, temporarily foregoing monthly rent payments on the building, or refinancing the building. However, the petitioner has provided no evidence to demonstrate that [REDACTED] and her husband received any of the officers' compensation paid by the petitioner, such as their individual federal tax returns or Forms W-2. Further, even if they did receive such payments, the record does not reflect how much each of them received individually. Even if she did receive officer's compensation payments, the petitioner has not established that payments to [REDACTED] exceeded the proffered wage or that she had the ability to forgo her officers' compensation to pay the proffered wage in each relevant year.¹⁴ Going on record

¹³ The value of the property is supported by tax assessment documents submitted on appeal, although no mortgage or loan documents were submitted to establish the debt currently owed by [REDACTED] and her husband on the property.

¹⁴ The record does not contain an affidavit from [REDACTED] husband indicating that he would be willing to forgo any officer's compensation received by him, nor does it contain evidence that he had the ability to forgo such payments.

without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Further, rents paid by the petitioner are already accounted for in the calculation of line 21 net income, and there is no evidence in the record that the petitioner could reduce the rent paid to the shareholders in order to pay the proffered wage. The petitioner must pay the fair rental value for the property. The petitioner did not provide a rental agreement between the parties establishing the required rent. Rents below fair rental value may be adjusted by the IRS. *See I.R.C. § 482.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

also states that she expects the petitioner's business to "pick up in the next year or so as the national and area economies start to improve." However, a petitioner must establish eligibility at the time of filing; a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

As noted by counsel on appeal, 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.

Counsel states on appeal that the petitioner has been in business since 1993 and has average gross sales of about \$650,000 per year. In response to the director's RFE, a letter dated June 17, 2005 from states that the petitioner expects "an increase in lottery revenue due to new games of lottery approximately 15% increase or 30,000 more income from the lottery." However, as

previously noted, a petitioner must establish eligibility at the time of filing; a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, [REDACTED] did not detail the information on which he based his estimates of lottery revenue.¹⁵ In the instant case, the petitioner was incorporated in 1993, but its corporate existence has been dissolved in Oregon. It has not established its historical growth since its incorporation, and its gross receipts fluctuated between 2002 and 2007. It paid minimal salaries from 2002 to 2007, and it has not established its reputation in its industry. 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.

Further, the petition must also be denied because [REDACTED] has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer and appellant.

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.

¹⁵ 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).