

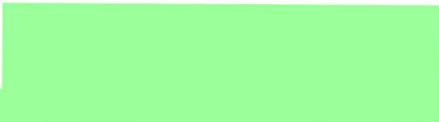


U.S. Citizenship
and Immigration
Services

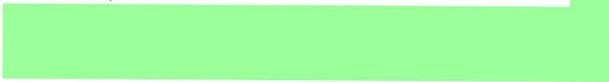
(b)(6)



DATE: JUN 27 2013 Office: NEBRASKA SERVICE CENTER



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 the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner is a window supply company. It seeks to employ the beneficiary permanently in the United States as a window repairer supervisor. 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. On January 23, 2008, the director denied the petition accordingly. The petitioner appealed, and the AAO dismissed the appeal on November 17, 2009.

As set forth in the director's January 23, 2008 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. In its review the AAO identified a second issue, namely, the identity of the actual petitioner, for whom the record showed various addresses, and whether there was a successor-in-interest relationship with two other companies identified in the record as [REDACTED]

[REDACTED] In response to an AAO Request for Evidence (RFE), the petitioner asserted that its owner previously owned [REDACTED] and that the petitioner was a successor-in-interest to [REDACTED]. In its decision, the AAO found that the petitioner had not established any successor-in-interest relationship with [REDACTED] or [REDACTED], and that considering only the tax returns of the petitioner, the petitioner had not established that it had the ability to pay.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion is properly filed, timely and meets the requirements for a motion. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. 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.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *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

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

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

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

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

Here, the Form ETA 750 was accepted on February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$33.94 per hour (\$70,595.20 per year). The Form ETA 750 states that the position requires two years of prior work experience in the proffered position.

On motion, the petitioner, through counsel, states that the petitioner is a successor-in-interest to [REDACTED], and that the AAO should consider the wages paid to the beneficiary by [REDACTED] when determining whether the petitioner has established the ability to pay.

The evidence in the record of proceeding shows that the petitioner, located at [REDACTED] was structured as a C corporation in tax years 2001 to 2003 and as an S corporation in tax years 2004 to 2006. On the petition, the petitioner claimed to have been established in March 24, 1994, and does

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).

not indicate its gross or net annual income or the number of workers it currently employs. According to the tax returns in the record, the petitioner's fiscal year is the calendar year.

The evidence of record includes the petitioner's Forms 1120, for tax years 2001, 2002, and 2003 and Forms 1120S, U.S. Corporate Tax Returns for an S Corporation for tax years 2004, 2005, 2006, and 2007.

The AAO requested in the RFE that the petitioner explain the actual relationship between [REDACTED] in tax years 2001 and 2002, and to further clarify the change in address for the petitioner.

In response, the petitioner submitted a letter dated September 17, 2009, from [REDACTED] the [REDACTED] was a company that he previously owned and operated in the state of New York, and that the company ceased operations in 2001-2002. He also provided a plot plan for the [REDACTED] streets block with identification of various tax lots. The AAO finds the petitioner's evidence has clarified the inconsistency in the addresses of record.

The petitioner has not established by a preponderance of the evidence that it is a successor-in-interest to [REDACTED] and that the petitioner may be credited with amounts paid to the beneficiary from [REDACTED]. The evidence in the record reflects that [REDACTED] and the petitioner are two distinct businesses owned and/or operated by the same owner with varying levels of operations in the 2001 to 2002 period of time. The entities are separate legal entities. 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 petitioner's ability to pay the proffered wage cannot be derived from a separate entity. As determined on appeal, only the tax returns for [REDACTED] will be considered in these proceedings.

Counsel reasserts that if the petitioner's net income added to the wages paid to the beneficiary during the period is equal to or greater than the proffered wage, USCIS could approve the petition. Counsel submitted W-2 Wage and Tax Statement Forms for the beneficiary for tax years 2000, 2001 and 2002. The 2001 W-2 Form indicates that [REDACTED] paid the beneficiary \$29,583.60, while the two W-2 Forms for 2002 indicated that [REDACTED] also located in [REDACTED] Texas, paid the beneficiary \$12,011.60 and \$16,829.21 respectively. Because the petitioner has not established a successor-in-interest relationship with either of the companies that paid the beneficiary's wage in 2001 and 2002, the AAO will not consider these wages to have been paid by 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. Comm. 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 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. Comm. 1967).

On motion, as on appeal, counsel states that USCIS may consider evidence relevant to the petitioner's financial ability that goes beyond the petitioner's net income and net current assets. Counsel asserts that any asset, including savings deposits, that is convertible to cash within one year can be used to establish the ability to pay the proffered wage. Counsel references two unpublished AAO decisions in support of the assertion that USCIS should add back depreciation, and that the petitioner's bank statements may be utilized to establish the petitioner's ability to pay the proffered wage.²

On appeal, counsel asserted that [REDACTED] as the petitioner's sole shareholder is free to use his personal income in his business matters. Counsel noted that the August 1998 issue of the *CPA Journal* states that an S Corporation passes the profit and losses directly to the shareholders who pay taxes and apply them against other income while filing their personal returns. On motion, as on appeal, counsel states that USCIS should consider not only the initial evidence involving the petitioner's tax returns, but also the sole shareholder's personal financial capability in addition to the petitioner's ability to pay the proffered wage.

The record contains [REDACTED] Forms 1040 for tax years 2001 and 2002. On accompanying Schedules E, the tax returns indicate [REDACTED] reported income or loss from one partnership and one S corporation in 2001 and one partnership and two S Corporations in 2002.³ Counsel also submitted the 2007 tax return for [REDACTED] that indicates ordinary net income of -\$44,249 and net current assets of \$153,841.

² While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

³ The Schedule E partnership was identified as [REDACTED] on both returns, and the S corporations were identified as [REDACTED] in 2002. With regard to adjusted gross income, [REDACTED] Forms 1040 indicated adjusted gross income of \$533,091 in 2001 and \$35,577 in 2002.

Counsel's assertions are not persuasive. USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.⁴

In determining [REDACTED] 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. As noted above, in its response to the AAO RFE, the petitioner submitted copies of the beneficiary's W-2 Forms from tax years 2001 and 2002 issued by [REDACTED]

[REDACTED] However, these documents were issued by businesses distinct from the petitioner as established by their Employer Identification Numbers (EIN).⁵ Therefore the AAO will not consider these documents as establishing wages paid by the instant petitioner to the beneficiary. In the instant case, the petitioner has not established that it employed and paid the beneficiary any wage from the priority date. Thus, the petitioner has to establish its ability to pay the entire proffered wage from 2001 onward based on its net income or net current assets.

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, contrary to counsel's assertion, 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). 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

⁴ The petitioner's Form 1120 for 2001 does not identify [REDACTED] as an officer, or sole shareholder.

⁵ The petitioner's EIN is [REDACTED]

expenses were paid rather than net income.

On motion, counsel contends that by adding back the depreciation expense deducted on the income tax returns the petitioner would have sufficient funds to pay the proffered wage. We disagree.

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 116. “[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).

Therefore, depreciation expenses deducted, if any, on the income tax returns may not be added back to the petitioner’s net income.⁶

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 director closed on October 16, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Since counsel submitted the petitioner’s 2007 tax return to the record in response to the AAO’s RFE, the AAO considers this document. The petitioner’s tax returns demonstrate its net income for tax years 2001 to 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$0.

⁶ It is noted that the 2001 and 2002 income tax returns for [REDACTED] do not reflect depreciation expense.

- In 2002, the Form 1120 stated net income of -\$73.
- In 2003, the Form 1120 stated net income of -\$4,013.
- In 2004, the Form 1120S stated net income⁷ of \$34,211.
- In 2005, the Form 1120S does not contain Schedule K. Therefore the AAO cannot determine whether the petitioner's net income is based on line 21 of the Form 1120S, or Schedule K. Line 21 indicates a net income of -\$77,146.
- In 2006, the Form 1120S stated net income of -\$159,521.
- In 2007, the Form 1120S the Form 1120S does not contain Schedule K. Therefore the AAO cannot determine whether the petitioner's net income is based on line 21 of the Form 1120S, or Schedule K. Line 21 indicates a net income of -\$44,249.

Therefore, for the years 2001 to 2007, the petitioner did not have sufficient net income to pay 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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-

⁷ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. The AAO notes that only in tax year 2004 did the petitioner in the instant petition have an additional deduction that reduced the petitioner's actual net income in that year. In tax years 2005 and 2007, the petitioner did not submit Schedule K to the record. Thus, in these tax years the AAO cannot determine whether the petitioner's net income is based on line 21, Form 1120S, or Schedule K. In tax year 2006, the petitioner's net income is found on line 21, of the Form 1120S.

⁸ 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.

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 tax years 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$2,500.
- In 2002, the Form 1120 stated net current assets of \$5,027.
- In 2003, the Form 1120 stated net current assets of \$106,331.
- In 2004, the Form 1120S stated net current assets of \$362,264.
- In 2005, the Form 1120S stated net current assets of \$380,889.
- In 2006, the Form 1120S stated net current assets of \$234,613.
- In 2007, the Form 1120S stated net current assets of \$153,841.

For the years 2003 to 2007 the petitioner had sufficient net current assets to pay the proffered wage. However, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the ability in the priority date year 2001 and in 2002 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 motion, counsel also references the petitioner's bank statements submitted in the response to the AAO's RFE, but the record contains no copies of any bank statements. Further, 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. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

On motion, counsel also contends that for the year 2001, the petitioner should not be required to establish the ability to pay for a full year's proffered wage but an amount which represents the pro-rata share of the annual wage for the period from the priority date of February 20, 2001 through December 2001. Counsel states that this pro-rated amount could be paid from the petitioner's income and would establish the petitioner's ability to pay the proffered wage for 2001. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the

year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, there is no such evidence in the record.⁹

On motion, counsel further contends that the USCIS should consider that as a startup, the petitioner should not be expected to pay the proffered wage during initial phases of its start up.

The petitioner indicates on its tax returns and on the Form I-140 that it was established in March 1994. Therefore, the AAO will not consider startup expenses in 2001 to be extraordinary expenses

Counsel's assertions on motion, as 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 (BIA 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

⁹ Were the AAO to prorate the proffered wage of \$70,595.20 per year from February 20, 2001 to December 31, 2001, for the year 2001 the petitioner would have had to pay \$60,924.62 (the yearly proffered wage prorated equals \$60,924.62 [$\$70,595.20 \times 315/365$]). Further, if the AAO were to consider the wages paid to the beneficiary by Window Works, Inc., the petitioner would still not establish the ability to pay. The petitioner has provided a 2001 Form W-2, issued by [REDACTED] for \$29,583.60 wages paid to the beneficiary for the portion of the year from the priority date. The petitioner has not submitted additional evidence of payment of the beneficiary's wages, and in 2001, the Form 1120 stated net income of \$0.

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.

While the petitioner has established its ability to pay the proffered wage in tax years 2003 to 2007, the record is devoid of evidence of the ability to pay in 2001 and 2002.

As discussed in the AAO decision, the record indicates that the petitioner has been in business since 1994. The record contains no further documentation on factors, such as the reputation or profile of the petitioner in the window replacement industry, or any circumstances that would have affected the petitioner's business operations in tax years 2001 and 2002. While the record reflects that the petitioner has a payroll and positive gross receipts, these two factors are not sufficient to conclude that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen and reconsider is granted. The appeal is dismissed as moot. The denial of the petition is undisturbed.