

(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: **MAR 01 2013**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Rachel Martino
for

Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

The petitioner is a manufacturer and installer of metal products. It seeks to employ the beneficiary permanently in the United States as a combination welder. 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 October 27, 2007 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.

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

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

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

Here, the Form ETA 750 was accepted on June 12, 2003. The proffered wage as stated on the Form ETA 750 is \$19.50 per hour for a 35-hour week (\$35,490.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered as a combination welder.

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 director denied Form I-140 on October 27, 2007. The petitioner appealed that decision on December 3, 2007. Since the appeal was filed in an untimely manner, but satisfied the regulatory requirements of a motion, the director treated the appeal as a motion.² Having reviewed the evidence submitted, the director issued a request for evidence (RFE) on August 22, 2008. The director then reaffirmed his decision on February 6, 2009. The petitioner appealed that decision on March 4, 2009.

With the initial petition, counsel submitted a chart, which the petitioner generated, itemizing the elements bearing upon the petitioner's ability to pay; copies of the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2003, 2004, and 2005; and copies of the petitioner's bank statements for 2003, 2004, and 2005. The director, finding that the documents supplied did not demonstrate the continuing ability to pay from the priority date in 2003 through 2005, issued an RFE on July 16, 2007, asking the petitioner to submit evidence of any wages, which the petitioner paid to the beneficiary in 2003, 2004, 2005, and 2006; a copy of the petitioner's federal income tax return for 2006; and any additional evidence supporting the petitioner's ability to pay for each of the years from 2003 through 2006, such as audited financial statements.

In response to the director's RFE, the petitioner provided none of the financial documents, which the director requested, but merely asserted that the petitioner paid \$600,000.00 to independent contractual workers, 40 percent of which was paid to welders, and further asserted that some of these funds could be redirected to compensate the beneficiary.

The director denied the instant petition, noting that the petitioner did not demonstrate the ability to pay for 2003, but did not address the petitioner's contention regarding substituting some of its independent contractual labor with the beneficiary.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states:

Untimely appeal treated as motion. If an untimely appeal meets the requirements of a motion to reopen as described in §103.5(a)(2) of this part or a motion to reconsider as described in §103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

With its initial appeal, the petitioner submitted another chart generated by the petitioner, itemizing its net assets and liabilities for 2003, 2004, 2005, and 2006 as well as its subcontractors' costs for 2003 and 2004; an affidavit dated November 8, 2007 from [REDACTED] President of [REDACTED] and copies of the petitioner's U.S. Income Tax Returns for an S Corporation (Form 1120S) for 2003, 2004, 2005, and 2006. On appeal, counsel for the petitioner again asserted that the petitioner intended to replace a number of its independent contractual workers with the beneficiary. However, the petitioner provided no evidence substantiating the compensation of such independent contractual labor. 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)).

Rather than render a decision based upon the evidence in the record and upon the petitioner's unsupported assertions, the director erroneously chose to issue a second RFE, asking the petitioner to supply position descriptions for each of its independent contractual workers and evidence of any compensation paid to these workers. In response to the director's August 22, 2008 RFE, the petitioner submitted copies of IRS Forms 1099 MISC, which the petitioner issued to independent contractual workers in 2003 and 2004; brief position descriptions for the contractual workers; and pay statements, which the petitioner issued to the beneficiary in 2008. On February 6, 2009, the director reaffirmed his decision, finding that the petitioner did not demonstrate that the beneficiary would or could replace 11 contractual workers and that such a contention was not feasible since the beneficiary commenced working with the petitioner prior to the utilization of the contractual workers. Further, the director noted that at least two of the workers identified were supervisors, occupying different positions than the beneficiary. With the second appeal, the petitioner provided only a statement referring to the documents already submitted on appeal.

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 1995 and currently to employ three 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 April 22, 2003, the beneficiary claims to have worked for the petitioner. However, the beneficiary did not identify any dates of employment.

On appeal, counsel asserts that the director failed to consider funds, which the petitioner paid to subcontractors. Counsel claims that the beneficiary would be replacing multiple subcontractors and, therefore, funds paid to them would be available to pay the beneficiary the proffered wage.

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).

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, USCIS electronic records show that the petitioner filed five other I-140 petitions, three of which, having been approved, were pending during the time period relevant to the instant petition.³ Where, as here, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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 Form 1099 MISC, which it issued to the beneficiary in 2003 as well as pay statements, which it issued to the beneficiary in 2008.

The beneficiary's IRS Form 1099 shows compensation received from the petitioner, as shown in the table below.

- In 2003, the Form 1099 stated compensation of \$835.00.

³ The petitioner filed Form I-140, bearing the receipt number [REDACTED] on December 7, 2005. This petition was approved on July 28, 2006. The priority date associated with this petition is June 8, 2005. The beneficiary of the employment-based visa petition has not obtained permanent residence. The petitioner filed Form I-140, bearing the receipt number [REDACTED] on December 28, 2007. This petition was approved on July 22, 2008. The priority date associated with this petition is April 27, 2001. The beneficiary of the employment-based visa petition obtained permanent residence on December 12, 2008. The petitioner filed Form I-140, bearing the receipt number [REDACTED] on October 21, 2010. The petition was approved on September 22, 2011. The priority date associated with this petition is October 18, 2007. The beneficiary of the employment-based visa petition has not obtained permanent residence. [REDACTED] and [REDACTED] were denied. The petitioner filed [REDACTED] for one of the individuals, which it paid as a subcontractor. However, this petition was denied.

The petitioner submitted pay statements, which were issued to the beneficiary during 2008. However, the pay statements represent payments made in June through September. As of September 5, 2008, the petitioner had paid the beneficiary \$17,600.00.⁴ However, the AAO will not consider funds paid using a stolen SSN for purposes of determining a petitioner's ability to pay.

Additionally, though the record of proceeding contains copies of Form 1099 MISC which were issued to various individuals during 2003 and 2004, the record contains no evidence of wages paid to the beneficiaries of the other I-140 petitions which are relevant to this period.⁵

⁴ The beneficiary's social security number (SSN), which appears on Form 1099 MISC for 2003 is different from the SSN, which appears on the pay statements that the petitioner issued to him in 2008. Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding SSN fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with SSN fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

⁵ It will also be noted that the petitioner submitted copies of IRS Forms 1099 issued to 16 independent contractors, other than the beneficiary, during 2003 and 2004. Of the 16 subcontractors,

In the instant case, for the reasons articulated above, the petitioner has provided no bona fide evidence of having paid the beneficiary the proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently through 2008.

The petitioner has not identified the proffered wage for the beneficiaries of the other pending I-140 petitions. The AAO will assume, therefore, that the wage is the same as the proffered wage in the instant case, \$35,490.00. Therefore, the petitioner must demonstrate the ability to pay two beneficiaries \$70,980.00 for 2003 and 2004; three beneficiaries \$106,470.00 for 2005 and 2006; and four beneficiaries \$141,960.00 for 2007.⁶

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

nine were compensated using stolen SSNs.

⁶ These figures are based upon the priority dates for the other petitions: April 27, 2001; June 8, 2005; and October 18, 2007.

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 would have closed on August 13, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s RFE. However, the director treated the untimely December 3, 2007 appeal as a motion and correctly addressed the matter of the petitioner’s substitution of contractual workers with the beneficiary, an issue which he erroneously overlooked in issuing his October 27, 2007 denial. Had the director not corrected his oversight, the AAO would have had to remand the case back to the director to address this issue. Yet, because the director chose to issue another RFE, the record closed on September 26, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s second RFE. As of that date, the petitioner’s 2007 federal income tax return would have been filed. Therefore, the petitioner’s income tax return for 2007 should have been the most recent return available. However, the most recent return submitted was for 2006.

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

- In 2003, the Form 1120S stated a net loss⁷ of \$4,237.00.

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 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 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 income, deductions and other adjustments shown on its Schedule K for 2003, 2004, 2005, and 2006 the petitioner’s net income is found on Schedule K of its tax returns.

- In 2004, the Form 1120S stated net income of \$24,877.00.
- In 2005, the Form 1120S stated net income of \$28,187.00.
- In 2006, the Form 1120S stated net income of \$67,975.00.
- For 2007, the petitioner submitted no regulatory prescribed evidence of its net income.

For the years 2003, 2004, 2005, 2006, and 2007, the petitioner has not demonstrated sufficient net income to pay the full proffered wage to the beneficiaries of the pending petitions.

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.⁸ 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 2003, 2004, 2005, and 2006, as shown in the table below.

- In 2003, the Schedule L stated net current liabilities of \$904.00.
- In 2004, the Schedule L stated net current assets of \$52,973.00.
- In 2005, the Schedule L stated net current assets of \$54,598.00.
- In 2006, the Schedule L stated net current assets of \$15,371.00.
- For 2007, the petitioner submitted no regulatory prescribed evidence of its net current assets.

Therefore, for the years 2003, 2004, 2005, 2006, and 2007, the petitioner has not demonstrated sufficient net current assets to pay the full proffered wage to the beneficiaries of the pending petitions.

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

On appeal and in response to the director's second RFE, counsel asserts that it utilized the services of numerous subcontractors⁹ who "work on multiple projects at the same time." In his affidavit, [REDACTED]

⁸According 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.

⁹ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa

owner of the petitioning business, asserts that the beneficiary would be replacing some of these workers, although he does not specifically identify which workers. In his letter which was submitted in response to the director's second RFE, identifies four welders other than the beneficiary who performed services as independent contractors in 2003 and six welders other than the beneficiary who performed services as independent contractors in 2004.

According to Form ETA 750B, the beneficiary worked for the petitioner in 2003. This is further verified by the fact that the petitioner submitted Form 1099 MISC, which was issued to the beneficiary in 2003. The petitioner has not demonstrated how or if the beneficiary could absorb the workloads performed by one or more of the six other welders as he asserts in his affidavit, particularly since stated that the various workers are utilized "to work on multiple projects at the same time." Further, the petitioner has not demonstrated that it has ceased using the contractors identified on the IRS Forms 1099. Although there is no line item for sub-contracted labor on the tax returns for 2005 or 2006, as had appeared in Statement 3 for Schedule A, Line 5 (other costs) for 2003 and 2004, the petitioner reports an equivalent sum in line 3 of Schedule A (cost of labor) for 2005 and 2006. This figure had not been reported on the 2003 or 2004 tax returns. This suggests that the sum claimed for subcontracted labor has been moved from one line to another on the Schedule A.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a 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

category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not demonstrate sufficient net income or net current assets to pay the proffered wages of its beneficiaries in 2003 through 2006. The petitioner has not established its historical growth since 1995, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or that the beneficiary would be replacing any employees or contractors who have left the petitioner's employ. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.