



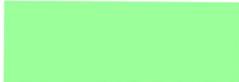
U.S. Citizenship
and Immigration
Services

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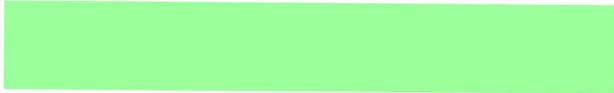
OFFICE: TEXAS SERVICE CENTER

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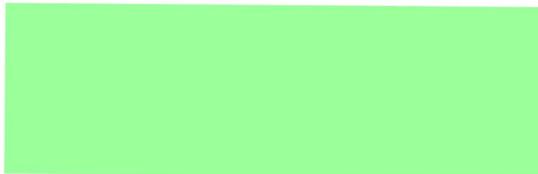
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) denied the employment-based immigrant visa petition and the petitioner has appealed the director's decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a restaurant chain. It seeks to permanently employ the beneficiary in the United States as a business analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner checked box "1.f." in Part 2 of the petition, indicating that it seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).² The priority date of the petition is March 23, 2005, which is the date that the labor certification was filed with DOL.

We conduct appellate review on a *de novo* basis.³ We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.⁴ An application or petition that fails to comply with the technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision.⁵

On May 28, 2013, the petitioner filed a Form I-140 petition on behalf of the beneficiary. On January 14, 2014, the director denied the visa petition, finding that the petitioner had not established a continuing ability to pay the beneficiary the proffered wage as of the March 23, 2005 priority date.⁶ On February 13, 2014, the petitioner appealed the director's decision to this office.

On appeal, counsel for the petitioner asserts that the director failed to consider the totality of the petitioner's financial circumstances by focusing solely on its federal tax returns. Counsel specifically contends that the director should have considered the petitioner's loans to its owner and only shareholder, as well as its owner's willingness to reduce his compensation, in assessing the petitioner's ability to pay the proffered wage. He also maintains that pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner may demonstrate its ability to pay the proffered wage with

¹ Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

² See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

³ See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp.*, *NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991).

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

⁵ *Supra* n. 3. See also *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003).

⁶ The record reflects that the petitioner has filed two prior Form I-140 petitions on behalf of the beneficiary. The director denied both petitions, on September 4, 2008 and December 4, 2009 respectively, based on the petitioner's failure to establish its ability to pay the proffered wage. The petitioner appealed the director's December 4, 2009 decision. We dismissed the appeal on August 6, 2012, also finding the evidence of record insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage.

such evidence as profit/loss statements, bank account records, or personnel records. Counsel notes that the petitioner has also submitted its bank statements for the period 2005-2009 and that these statements reflect an average monthly account balance in excess of the proffered wage, if the proffered wage is calculated on a monthly basis. He further asserts that the director disregarded the fact that the petitioner has been a financially viable organization for more than 20 years and that there is no reason to doubt its ability to continue in business.

Petitioner's Ability to Pay the Proffered Wage

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 In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any subsequently filed immigrant visa petition, a petitioner must establish that a job offer is realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. Where a petitioner has filed petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each sponsored worker. *See Matter of Great Wall*, at 144-145; *see also* 8 C.F.R. § 204.5(g)(2).

In the present case, the priority date of the visa petition is March 23, 2005. The proffered wage, as stated on the labor certification, is \$45,000.00 a year. Accordingly, the petitioner must establish a continuing ability to pay the beneficiary the proffered annual wage of \$45,000.00 from March 23, 2005 forward.

The record contains the following evidence relating to the petitioner's ability to pay includes: a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation (tax return) for each year of the period 2005 through 2013; copies of the Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, it issued to the beneficiary from 1999 through 2013; earnings statements for the beneficiary from 2005, 2009, 2013; Forms 941, Employer's Quarterly Tax Returns, reflecting the wages paid by the petitioner during 2012 and 2013; copies of the Forms 1040, U.S. Individual Income Tax Returns, filed by the petitioner's owner for the years 2005 through 2007; copies of its bank statements from 2005 through 2009; statements from its accountant, [REDACTED] analyzing its current assets and its ability to pay; statements from Certified Public Accountant (CPA) [REDACTED] regarding the calculation of the petitioner's net current income for the years 2005

through 2007; statements from the petitioner's owner regarding the shareholder loans made to him by the petitioner in 2005, 2006 and 2007, as well as his willingness to use his personal assets and officer compensation to meet the proffered wage; and copies of loan agreements and promissory notes documenting the petitioner's loans to its owner for the years 2005 through 2007.

To determine a petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence may be considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, 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).⁷ If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

The Forms W-2 in the record reflect the beneficiary's income from the petitioner as follows:

- \$11,572.00 in 2005;
- \$7,430.00 in 2006;
- \$16,500.00 in 2007;
- \$29,900.00 in 2008;
- \$33,150.00 in 2009;
- \$36,450.00 in 2010;
- \$39,000.00 in 2011;
- \$37,500.00 in 2012; and

⁷ 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).

- \$39,000.00 in 2013.

Accordingly, the petitioner did not pay the beneficiary at or above the proffered wage in any year of the relevant period and cannot establish its ability to pay on this basis.

The petitioner's tax returns report its net income⁸ for the relevant period as follows:

- \$15,741.00 in 2005;
- \$35,142.00 in 2006;
- \$22,296.00 in 2007;
- \$56,589.00 in 2008;
- (\$121,263.00)⁹ in 2009;
- (\$26,670.00) in 2010;
- \$59,907.00 in 2011;
- \$97,455.00 in 2012; and
- \$313,188.00 in 2013.

Therefore, the petitioner's tax returns establish that it had sufficient net income to pay the proffered wage of \$45,000.00 a year in 2008, 2011, 2012 and 2013; they fail to establish that it had sufficient net income to pay the difference between the wages it paid the beneficiary and the proffered wage in 2005, 2006, and 2007, as well as in 2009 and 2010.

As indicated above, when a petitioner's net income does not establish its ability to pay the proffered wage, its net current assets, the difference between its current assets and current liabilities,¹⁰ will be considered. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 of its tax return. Its year-end current liabilities are shown on lines 16 through 18. During the years 2005-2007 and 2009-2010, the petitioner's tax returns reported the following net current assets:

- \$1,609.00 in 2005;
- \$26,925.00 in 2006;
- \$1,004.00 in 2007;
- (\$18,502.00) in 2009; and
- \$53,898.00 in 2010.

⁸ 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) or line 18 (2006-2011) of Schedule K.

⁹ Dollar amounts stated in parentheses are negative amounts.

¹⁰ 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.

In that the petitioner reported net current assets of \$53,898.00 in 2010, it has also demonstrated its ability to pay the proffered wage to the beneficiary in 2010.¹¹

Therefore, based on the above analysis of the wages paid to the beneficiary, as well as petitioner's net income and net current assets, it has established its ability to pay the proffered wage only in the years 2008, 2010, 2011, 2012, and 2013. The petitioner has not established its ability to pay the proffered wage in the years 2005, 2006, 2007, and 2009.

On appeal, counsel for the petitioner contends that the director's determination that the petitioner's net income and net current assets do not establish its ability to pay the proffered wage is in error, as he failed to consider the financial resources immediately available to the petitioner in the form of its owner's personal assets and officer compensation, the shareholder loans reported on its tax returns, and its average monthly bank balances in excess of the proffered wage, if the proffered wage is prorated on a monthly basis.

Owner's Personal Assets and Officer Compensation

Counsel maintains that the willingness of the petitioner's owner to use his personal income to cover the proffered wage in any year where the petitioner is unable to do so should be considered "an additional financial resource of the petitioner, in addition to its figures for ordinary income." A June 3, 2013 letter from [REDACTED] the petitioner's accountant, supports counsel's assertion. In his letter, Mr. [REDACTED] states that the petitioner's owner possesses a personal net worth of approximately \$4 million and that his substantial personal assets allow him to finance any "shortfall the company's tax returns have shown to reduce tax liabilities or minimize the tax burden of the business." Mr. [REDACTED] indicates that such a practice that is "hardly unusual and is actually in compliance with generally accepted accounting practices."

The record contains multiple statements from the petitioner's owner indicating his willingness to use his personal income and assets, including his officer compensation from the petitioner, to meet the proffered wage in any years where the petitioner is unable to do so. In his most recent statement on this subject, that of August 10, 2013, the petitioner's owner states that "as the controlling officer and shareholder of the petitioner, by law I have the right to determine and/or reduce my compensation if I so desire." He also states that "in the event there are insufficient funds to pay the [b]eneficiary the proffered wage of \$45,000 per annum, I will not hesitate to use my personal funds (i.e., capital gains or sales income) as necessary to ensure the [b]eneficiary will be paid the proffered wage." He also maintains that he is "willing and able to use officer's compensation or his sales income from other businesses" to pay the proffered wage. The petitioner's owner states that he is able to personally pay the proffered wage without "impairing my own ability to earn a living and support myself and my family."

¹¹ The director's decision incorrectly indicated that the petitioner had established its ability to pay the proffered wage in 2006. However, when the petitioner's reported net assets of \$26,925.000 are added to the beneficiary's wages of \$7,430.00 for 2006, they total only \$34,355 or \$10,645.00 less than the proffered wage of \$45,000.

To demonstrate that its owner has the financial ability to carry through on his pledge, the petitioner has submitted his Forms 1040, U.S. Individual Tax Returns, for the years 2005, 2006, 2007, and 2009. The record also contains two letters from the petitioner's owner, dated April 7, 2009 and December 3, 2013. The first provides his family's monthly expenses as of the date of the letter; the second reflects his annual expenses during the years 2005, 2006, 2007, and 2009.

Although counsel asserts that the willingness of the petitioner's owner to use his personal income to pay the beneficiary's salary should be considered in this matter, the personal assets of the petitioner's owner may not be used to establish the petitioner's ability to pay. The petitioner is a separate and distinct legal entity from its owner and shareholder. Therefore, the assets of its owner, as well as his income from other enterprises or corporations, cannot be considered here. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 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." Accordingly, the petitioner may not rely on its owner's personal assets or income to supplement its ordinary income.

We have, however, considered counsel's assertions regarding the willingness of the petitioner's owner to forego his officer compensation from the petitioner in order to meet the proffered wage.

The record reflects that the petitioner is an S corporation, with an owner who is also its only shareholder. We recognize that the sole shareholder of an S corporation has the authority to allocate the expenses of that corporation for various legitimate business purposes, including that of reducing the corporation's taxable income and that the compensation of officers is an expense category explicitly stated on the IRS Form 1120S. Moreover, the record offers evidence of the willingness of the petitioner's owner to make his compensation available to pay the beneficiary's wages. However, the petitioner's tax returns for 2005, 2006, and 2007 report that the petitioner paid no officer compensation. Further, although the petitioner's 2009 tax return reflects \$32,936.00 in officer compensation, which when added to the wages paid to the beneficiary, is sufficient to meet the proffered wage in that year, the 2009 tax return for the petitioner's owner reports negative income of \$89,347.00, and, therefore, fails to demonstrate that, in 2009, the petitioner's owner had other income that would have allowed him to forego the compensation reflected in the petitioner's tax return. Even if we accepted that the petitioner could devote the officer compensation for 2009 to the proffered wage in 2009, it would not demonstrate the petitioner's ability to pay the proffered wage in 2005, 2006, or 2007. Accordingly, the record does not establish the petitioner's ability to pay the beneficiary the proffered wage in 2005, 2006, 2007, or 2009 by relying on officer compensation.

Shareholder Loans

On appeal, counsel states that the petitioner, as an S corporation, customarily shifts its profits to shareholder loans in order to reduce its tax liabilities. He asserts that such shareholder loans, therefore, represent a readily available asset that should be considered in determining the petitioner's ability to pay the proffered wage. He contends that when shareholder loan totals are added to the petitioner's available cash, the totals are "more than sufficient to pay . . . the entire proffered wage."

In his June 3, 2013 letter, [REDACTED] supports counsel's claims, stating that the shareholder loans reflected in the petitioner's tax returns represent "available assets given their discretionary nature under the sole shareholder's authority." He contends that the shareholder loans reflected on the petitioner's tax returns "positively reflect" on its ability to pay the proffered wage as they are current assets, payable on demand to the petitioner and non-interest bearing. The record also includes February 19, 2009 and January 18, 2010 statements from CPA [REDACTED] who indicates that he finds USCIS to have erred in failing to consider shareholder loans in its analysis of the petitioner's net current assets. Mr. [REDACTED] asserts that the petitioner's shareholder loans should be considered to be current assets because they are "receivable on demand and the amount has been [fluctuating] during the entire year," and that they meet the definition of current assets set forth in Black's Law Dictionary, as well as the definition in the standards established by Generally Accepted Accounting Principles. In support of his opinion, Mr. [REDACTED] submits a March 5, 2009 statement from the petitioner's owner in which the petitioner's owner states the following with respect to the shareholder loans reported on Schedule L of the petitioner's 2005, 2006 and 2007 tax returns:

All of the above loans are payable on demand to [the petitioner] and are non-interest bearing. The . . . amounts are fluctuating because they have been paid back during the year. This account is maintained like a revolving credit line to the shareholder, which fluctuates based upon business needs. Therefore, [the petitioner's] loans to [the] shareholder are current assets.

Our July 3, 2014, RFE asked for documentary evidence establishing that the shareholder loans reflected in its tax returns for 2005, 2006 and 2007 in the amounts of \$150,908.00, \$143,758.00 and \$79,663.00, respectively, represented shareholder loans rather than dividends due its only shareholder. Specifically, we asked for evidence establishing that the reported shareholder loans were payable to the petitioner on demand, including formal loan agreements, promissory notes, evidence of securities used for the loans and specific repayment schedules.

In response, the petitioner provided a new letter from [REDACTED] dated July 28, 2014, who states that he is "a Certified Public Accountant in the State of New York," has been the petitioner's accountant for more than 20 years and is intimately familiar with the state of its finances, operations, books and records. Mr. [REDACTED] states that the petitioner "customarily applies generally accepted accounting principles for S corporations to minimize its tax liability by issuing shareholders loans." He further states that all shareholder loans are payable on demand to the petitioner and, therefore, that the shareholder loans made to the petitioner's owner in 2005 through 2007 represented funds that were readily accessible to the petitioner during these years.

While we note Mr. [REDACTED] assertions regarding the shareholder loans made by the petitioner to its owner, we also observe that the official database of the [REDACTED] which provides online verification of professional credentials, reflects that Mr. [REDACTED] is not, contrary to his assertions in his July 28 statement, currently registered as a Certified Public Accountant in New York.¹² In that the database does not indicate the date on which Mr. [REDACTED] ceased to be

¹² See [REDACTED] (accessed December 17, 2014). Mr. [REDACTED] letterhead, which identifies him as a

registered as a CPA, we find his claim to be a practicing CPA in his July 28, 2014 letter and in his previous statements in support of the petition to cast doubt on reliability of his assertions regarding the petitioner's financial circumstances. Accordingly, we will accord Mr. [REDACTED] opinions less evidentiary weight in this matter. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also submitted copies of Shareholder Loan Agreements (SLAs) and Promissory Notes (PNs) relating to the shareholder loans reported on its tax returns for 2005, 2006 and 2007, all of which state that the loan must be paid on demand by the petitioner. There is a discrepancy between the SLAs and PNs. The March 5, 2009 statement from the petitioner's owner, and each of the Promissory Notes, indicate that the loan is made "without interest payable on the unpaid principal." However, all of the SLAs state that, while no interest payments are required during the life of the loan, interest accrues annually at a rate equal to the published "prime rate" while the loan is outstanding and the repayment amount will include all accrued interest. Further, the SLAs do not indicate the loans are due within one year. They indicate both an interest rate and an actual schedule for accrual that conflict with the petitioner's assertions. The petitioner has neither noted this inconsistent description of the terms under which the petitioner issued its loans to its owner, nor provided an explanation for it. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92. Accordingly, we do not find the submitted loan agreements and notes to establish that the payments reported as shareholder loans on the petitioner's tax returns for 2005 through 2007 are actually shareholder loans, or that they would qualify as current assets with a life of one year or less.

Moreover, under Internal Revenue Code (IRC) § 7872, the recipients of on-demand shareholder loans made at below-market rates, including an interest-free loan like that claimed by the petitioner's owner, are imputed to have received loans requiring the payment of interest at the applicable federal rate,¹³ as well as additional payments in amounts equal to the foregone interest, which are to be treated by the recipients as distributions of money or dividends, and reported as income. See proposed 26 C.F.R. § 1.7872-4(d)(1). In turn, the tax code then treats these additional payments as having been transferred back to the lenders as interest, the receipt of which is generally dated as having occurred on December 31. The lenders must report these transfers as interest income on their taxes.

Here, a review of the petitioner's owner's tax returns for the years 2005 through 2007 finds no reporting of the dividends that would have been imputed to him under IRC § 7872 as the recipient of a below-market shareholder loan. Neither do the petitioner's tax returns report any interest income from the shareholder loans it states it provided to its owner in these years. For this reason as well,

CPA, reflects that he also works at a location in New Jersey; state records do not indicate that he has ever been licensed as a CPA in New Jersey. [REDACTED] (accessed December 17, 2014).

¹³ IRC § 7872(f)(2)(B) states that for the purposes of calculating foregone interest, the federal applicable rate will be the federal short-term rate. To simplify interest calculations for demand loans, IRC § 7872(f)(3)(2) allows for the use of a blended annual rate, with a fixed principal amount outstanding for an entire calendar year. The blended annual rate is published by the Internal Revenue Service each June.

the record does not establish that the amounts of money purportedly transferred by the petitioner to its owner in 2005 through 2007 were shareholder loans that would be available to satisfy the proffered wage.

Further, although the record contains statements from the petitioner's owner and Mr. [REDACTED] that indicate the shareholder loan amounts reflected in Schedule L of the petitioner's 2005, 2006 and 2007 tax returns were paid back during the following tax year, we find no evidence of these repayments in the petitioner's tax returns and no separate documentary evidence of their disbursement or repayment have been provided. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the absence of such evidence, the petitioner has also failed to establish that the monies transferred to its owner in 2005, 2006 and 2007 may be considered current assets, i.e., items having a life of one year or less.¹⁴

Bank statements

On appeal, counsel asserts that the regulation at 8 C.F.R. § 204.5(g)(2) allows the petitioner to demonstrate its ability to pay the proffered wage through the submission of additional evidence in the form of profit/loss statements, bank account records, or personnel records. In the present case, the petitioner has submitted its bank statements for the years 2005 through 2009, which, counsel states, should be considered as documentation of a readily available asset that could have been used to pay the beneficiary the proffered wage. Counsel asserts that the petitioner's average monthly balance of approximately \$8,800.00 during these years exceeds the prorated monthly proffered wage of \$3,750.00. In his June 3, 2013 letter, Mr. [REDACTED] states that the petitioner's monthly bank balances in 2012 averaged \$6,525.00, which he maintains is sufficient to cover the proffered wage, prorated on a monthly basis.

However, we cannot accept the petitioner's bank statements as evidence of its ability to pay the proffered wage. Bank statements reflect the amount in an account on a given date, rather than the sustainable ability to pay a proffered wage. Moreover, the petitioner has submitted no evidence to demonstrate that the funds reported on its bank statements represent funds that were not reflected on its tax returns, i.e., the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L of its tax returns as a current asset, and, therefore, previously considered in determining its net current assets. Accordingly, we do not find the petitioner's submission of its monthly bank statements to establish its ability to pay the proffered wage.

Therefore, the record does not demonstrate that the petitioner has either the net income or the net current assets to pay the proffered wage from the priority date onward. Accordingly, we will consider the overall magnitude of the petitioner's business activities pursuant to *Matter of Sonogawa*.

¹⁴ *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000).

Totality of Circumstances

On appeal, counsel asserts that the director disregarded the totality of the petitioner's circumstances, which, he states, clearly establish its ability to pay the proffered wage. Counsel asserts that the petitioner has been a financially viable organization for more than 20 years and that there is no reason to doubt its ability to continue in business in the near future. He asserts that, like the petitioner in *Matter of Sonogawa*, the petitioner in the present case, despite showing a loss on its tax return in 2009, generates significant income, has experienced business growth over its history and has a reasonable expectation of continued growth in its business and profits. Counsel also maintains that we have previously approved visa petitions where employers have established an ability to pay the proffered wage based on the totality of their circumstances despite income loss.

We note that in *Sonogawa*, the petitioner 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 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.

We acknowledge that the petitioner in the present case has been in business since 1988, and that, since 2006, its gross receipts have exceeded \$1 million annually, with the exception of 2009, when its gross income declined to \$869,009.00. We also note that the petitioner's submission of Forms 941 for the first quarter of 2011, three quarters of 2012 and the first quarter of 2013 reflect that it paid substantial wages to between 12 and 15 employees during this period. However, the petitioner's tax returns do not report a similar sustained increase in net income; instead its tax returns reflect a decrease in net income from \$35,142.00 in 2006 to \$22,296.00 in 2007, years in which, as previously indicated, it also paid no officer compensation to its owner. The record also reflects that although the petitioner had \$56,589.00 in net income in 2008, it reported negative net income of \$121,263.00 and \$26,670.00 in 2009 and 2010 respectively. As previously noted, the petitioner has not demonstrated its ability to pay the proffered wage from the priority date in 2005 through 2007, as

well as in 2009. Thus, the petitioner's circumstances in four of the initial five years from the priority date fail to demonstrate its ability to pay the proffered wage.

In response to the June 3, 2014 RFE, counsel submitted evidence to explain the decrease in the petitioner's net income during the 2005 to 2007 period and its negative net income and net current assets in 2009. Counsel asserts that the decrease in the petitioner's net income in 2005 and 2006 resulted from the loss of its ability to use "its outdoor spacious and very lucrative seating area" as a result of construction that required the erection of scaffolding on the building in which the petitioner is located. Counsel asserts that the scaffolding completely blocked the petitioner's sidewalk seating area, and resulted in the loss of \$4,200 in business each day. Counsel further contends that the petitioner's owner underwent major heart surgery in 2007 and that the petitioner suffered without his day-to-day guidance, but that from 2008 through 2013, the business has "consistently generated significant income and has experienced "continual business growth with each passing year."

In support of counsel's assertions, the petitioner has submitted a July 28, 2014 statement from its owner, in which he outlines the negative impacts of the above-noted construction on his restaurant's business in 2005 and 2006, as well as the effect of his cardiac problems and subsequent surgery on the business' income in 2007. He states, however, that with his recovery in 2008, his restaurant business experienced significant financial growth. The July 28, 2014 statement is accompanied by two undated digital color photographs of the petitioner's outdoor seating area and a third digital color photograph of scaffolding at an unidentified corner location, representative photographs of typical scaffolding around [REDACTED] and a March 24, 2013 article from the online [REDACTED] which discusses the impacts of the growing numbers of scaffolds in [REDACTED]. The petitioner has also provided a copy of a card issued to its owner documenting that in 2007 he was the recipient of a cardiac stent(s).

The record also contains a copy of a 2009 social media news release synopsis, [REDACTED] issued on December 19, 2008 by the [REDACTED]. The synopsis indicates that while the restaurant industry is "experiencing unprecedented challenges due to the economic recession and elevated food prices," the industry will remain a cornerstone of the economy" and that Americans will "continue to rely on restaurants as a key part of their lifestyle."

Further support of counsel's contention that the totality of the petitioner's circumstances establish its ability to pay the proffered wage is found in the June 3, 2013 letter from Mr. [REDACTED]. He states that the petitioner has been in business in the competitive [REDACTED] restaurant industry since 1988 and that its owner is "a highly respected and experienced restaura[n]ter and restaurant consultant, [who] has owned many restaurants over the years and currently owns or is a partner in ... [REDACTED]. He further describes the petitioner's overall financial capability as "quite formidable" and that the petitioner has "succeeded in maintaining its sales and revenues during the past five (5) years while sustaining normal operating expenses such as salaries and wages . . . as well as meeting the obligations of other ordinary business expenses." Mr. [REDACTED] also states that in the event of any cash shortages, the petitioner has had a line of credit with [REDACTED] since 2005 and could access these funds as needed. He further asserts that a loss indicated on the petitioner's tax return should "not be

read in isolation as it would otherwise inaccurately reflect on the [p]etitioner's ability to pay the prevailing wage to the [b]eneficiary out of cash flow." He concludes that it is his professional opinion that the petitioner "will continue to operate and grow in a financially health manner as well as continue to pay salaries and meet its normal operating expenses." However, as previously discussed, Mr. [REDACTED] claim to be operating as a CPA in New York when he is not registered to do so casts doubt on his assertions regarding the petitioner's financial circumstances. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591-92.

We also find that counsel's claim regarding the steady business growth experienced by the petitioner following the recovery of its owner from heart surgery in 2008 is not supported by the record. As previously noted, the petitioner's tax returns indicate that in the years immediately following the recovery of its owner, 2009 and 2010, the petitioner reported negative net income. Moreover, we observe no continuous or significant increase in the gross receipts reported by the petitioner in its tax returns for the period 2005 through 2013. Although, as noted above, the petitioner has submitted a synopsis of a [REDACTED] news release regarding the impact of the 2008 economic recession on the restaurant business in 2009, it makes no specific claim as to the recession's impact on its business in 2009 or 2010.

We further note that while the petitioner claims that the low net income reported in its 2005 and 2006 tax returns was the result of construction scaffolding that eliminated its outdoor dining area, it does not document this claim. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Although the petitioner submitted various images of unidentified New York locations with scaffolding, including the digital color photograph previously noted, it has provided no evidence, including permits or notices, which demonstrates its outdoor area was a construction site during 2005 and 2006. The petitioner has also submitted insufficient evidence to establish that the drop in its net income in 2007 resulted from its owner's health problems. Although we acknowledge the implant card issued to the petitioner's owner, it does not, by itself, demonstrate the impact that the owner's health had on his ability to oversee the petitioner's operations prior to the surgical procedure or thereafter. The petitioner has not established that the restaurant ceased operating during his surgery, or that the restaurant's management could not continue its operations without him. Therefore, the record contains insufficient evidence to establish that the reduced or negative income reported by the petitioner in 2005 through 2007 and, again, in 2009 and 2010 is the result of uncharacteristic business expenditures or losses, or other unforeseen events, rather than foreseeable or characteristic fluctuations in the petitioner's economic fortunes. Accordingly, we do not find the record to demonstrate the petitioner's ability to pay the proffered wage based on the totality of its circumstances.

In reaching this conclusion, we note counsel's assertions that we have previously sustained appeals in cases where petitioners, without sufficient net income and net current assets, have asserted their ability to pay the proffered wage based on the totality of their financial circumstances. However,

these prior decisions, which were decided on the basis of facts unique to the referenced cases, do not provide a basis for approving a petition where, as here, a petitioner has not established eligibility. Moreover, as non-precedent decisions, our prior decisions are not binding on us in this matter.

Therefore, we do not find the record to establish the petitioner's ability to pay from the March 23, 2005 priority date forward. We will affirm the director's January 14, 2014 denial of the visa petition based on the petitioner's failure to establish its ability to pay the beneficiary the proffered wage.

The petitioner's ability to pay is not the only basis on which the instant petition must be denied. Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.¹⁵

Beneficiary's Qualifications

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition.¹⁶ In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.¹⁷

Part A.14. of the labor certification states the requirements of the offered position, business analyst, as: three years of college education in any field of study¹⁸ and two years of experience as a business analyst or in a related occupation, which is not identified. In Part B.15., the beneficiary claims part-time employment (28 hours a week) with the petitioner as a business consultant beginning January 2004; he also indicates that he was employed part-time (20 hours a week) as a business consultant by [REDACTED] from November 2002 until January 2004.

At the time petitioner submitted the instant petition, it provided a May 31, 2013 letter, which indicated that it sought to qualify the beneficiary for the offered position based on his employment with the [REDACTED] from December 20, 1999 to August 31, 2002, and with [REDACTED] from November 2002 until January 2004. To satisfy the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A), the petitioner has submitted statements from [REDACTED] who states that she is a former Staff Manager at the [REDACTED] [REDACTED] who identifies himself as Personnel Manager at [REDACTED] [REDACTED] in

¹⁵ *Supra* n. 3, 5.

¹⁶ 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

¹⁷ *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

¹⁸ The petitioner has submitted a copy of the beneficiary's baccalaureate degree, which reflects that in December 1998 he was awarded a Bachelor of Science in Business Administration by the [REDACTED]. However, the copy of the degree certificate reflects certain anomalies that indicate it may have been altered. Further, the seal on the certificate does not appear to be that of [REDACTED]. In any future proceedings, the petitioner must submit certified copies of the original degree certificate and academic transcript.

a July 22, 2008 statement, asserts that the beneficiary worked for the [REDACTED] as a business consultant from December 20, 1999 to August 31, 2002; Mr. [REDACTED] asserts in an October 4, 2007 statement that the beneficiary worked as a business consultant for [REDACTED] from November 2002 until January 2004 and, in a July 21, 2008 statement, maintains that the beneficiary was employed by [REDACTED] from November 1, 2002 until January 31, 2004.

For the reasons discussed below, we do not find these statements to satisfy the requirements at 8 C.F.R. § 204.5(1)(3)(ii)(A).

Beneficiary's Employment with [REDACTED]

Although the petitioner has submitted evidence for the purpose of establishing that the beneficiary worked as a business consultant for the [REDACTED] the beneficiary did not claim this employment in Part B.15. of the labor certification. In response to the instructions that directed him to list all jobs held during the previous three years, as well as "any other jobs related to the occupation for which the alien is seeking certification," the beneficiary listed only his employment with the petitioner, which began in January 2004, and with [REDACTED]. The Board of Immigration Appeals (BIA) observed in *dicta* in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) that the credibility of evidence and facts asserted regarding a beneficiary's employment is lessened if that experience is not certified by DOL on the labor certification.

Forms W-2 issued to the beneficiary by the [REDACTED] for the years 1999, 2000 and 2001 are found in the record. However, the Forms W-2 establish only that the beneficiary was employed by the hotel from 1999 through 2001. They do not demonstrate the type of work that he performed or indicate the number of hours he worked each week. We also find the above noted July 22, 2008 affidavit from [REDACTED] which indicates that the beneficiary was employed as a business consultant by the hotel from December 20, 1999 to August 31, 2002, insufficient to establish the beneficiary's employment experience with the [REDACTED] 8 C.F.R. § 103.2(b)(2)(i) (the petitioner must demonstrate the non-existence or unavailability of both the required document, and relevant secondary evidence, before submitting at least two affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of that which must be proved).

The petitioner's May 31, 2013 letter indicated that it was providing the affidavit from [REDACTED] in support of the beneficiary's experience with the [REDACTED] rather than a statement on hotel letterhead because the September 11, 2001 terrorist attacks on New York had resulted in the temporary closure of the hotel and the loss of many business and personnel records, which were "presently unavailable." However, the petitioner in this matter has submitted no evidence that demonstrates that on July 22, 2008, the date of [REDACTED] affidavit, or on May 28, 2013, the date on which it filed the visa petition, the [REDACTED] was unable to issue an experience letter for the beneficiary as a result of lost business records. Neither has it submitted secondary evidence of the beneficiary's employment with the [REDACTED] e.g., copies of the hotel's offer of employment to the beneficiary, business or other records outlining his job title or duties, nor established that such evidence cannot be provided. Accordingly, we may not accept the single

affidavit from [REDACTED] affidavit as a substitute for the experience letter required by the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A).

We also note that [REDACTED] affidavit fails to indicate the number of hours that the beneficiary worked on a weekly basis. Moreover, [REDACTED] assertion that the beneficiary was employed by the [REDACTED] until August 31, 2002 is not supported by the beneficiary's Forms W-2, the most recent of which is from 2001. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For all these reasons, we do not find the petitioner to have established that the beneficiary acquired experience as a business analyst with the [REDACTED]

Beneficiary's Employment with [REDACTED]

The beneficiary claimed on the labor certification to have also been employed 20 hours a week by [REDACTED] as a business consultant from November 2002 until January 2004. In support of this claim, the petitioner has submitted two statements, dated October 4, 2007 and July 21, 2008, from [REDACTED] who states that he is the Personnel Manager for [REDACTED] and indicates that the beneficiary was employed by his company as a business consultant from November 1, 2002 until January 31, 2004. However, like the affidavit from [REDACTED] Mr. [REDACTED] statements are not on [REDACTED] letterhead, which casts doubt as to whether they are letters issued by the employer, [REDACTED]. The record does not indicate that [REDACTED] was unwilling or unable to provide an experience letter to confirm its employment of the beneficiary during the relevant period. We also find the record to contain no Forms W-2 or other independent objective evidence that would demonstrate the beneficiary's employment with [REDACTED] during the time period claimed on the labor certification. Neither do we find any evidence to establish that Mr. [REDACTED] was employed by [REDACTED] as its Personnel Manager during this same period. Therefore, the statements from Mr. [REDACTED] also fail to meet the requirements of the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) and do not establish the beneficiary's experience as a business consultant with [REDACTED]

The record does not demonstrate that the beneficiary had the experience required by the labor certification as of the priority date. Therefore, the petitioner has not established that he is qualified for the offered position. Accordingly, the appeal will be dismissed for this reason as well.

Conclusion

A petitioner must establish the elements for the approval of a petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present case, however, the record does not establish either the petitioner's continuing ability to pay the beneficiary the proffered wages or the beneficiary's qualifications for the offered position as of the March 23, 2005 priority date.

Therefore, the director's January 14, 2014 decision will be affirmed for the above stated reasons, with each considered as an independent and alternative basis for the denial of the petition. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.