



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF A-C-, INC.

DATE: MAR. 8, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a computer consulting services and corporate resources company, seeks to employ the Beneficiary as a management analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The petition was initially approved. Subsequently, the Director, Texas Service Center, revoked the approval of the immigrant petition, concluding that the Petitioner had not established that it had the continuing ability to pay the proffered wages of all its I-140 beneficiaries and all its H-1B nonimmigrant employees.

The matter is now before us on appeal. On appeal, the Petitioner asserts that it has had the ability to pay the proffered wage to the Beneficiary and its other I-140 beneficiaries, that the Director erred in understating wages paid to certain workers, and that he should not have considered deficiencies in wages paid to H-1B beneficiaries. We issued the Petitioner a notice of intent to dismiss and request for evidence (NOID/RFE) regarding the Petitioner's ability to pay the wages of its other sponsored workers. Following the Petitioner's response, upon *de novo* review, we will dismiss the appeal.<sup>1</sup>

#### I. LAW AND ANALYSIS

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

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<sup>1</sup> This dismissal is based solely on the Petitioner not establishing its ability to pay its sponsored I-140 beneficiaries without consideration of its H-1B wage obligations.

Section 212(a)(5)(A)(i) of the Act provides that DOL's purpose in the labor certification process is to certify that:

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

After DOL has certified the labor certification, the petitioner files a Form I-140, Immigrant Petition for Alien Worker, with United States Citizenship and Immigration Services (USCIS). The petitioner must establish, among other things, that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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, 144 (Acting Reg'l Comm'r 1977). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's 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.

Thus, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d).

Here, the labor certification was accepted on November 17, 2011. The proffered wage as stated on the labor certification is \$96,400.00 per year.

The evidence in the record of proceedings shows that the Petitioner is structured as an S corporation. On the petition, the Petitioner claimed to have been established in 2004 and to currently employ 95 workers. According to the tax returns in the record, the Petitioner's tax year is based on a calendar year. On the labor certification, signed by the Beneficiary on December 12, 2012, the Beneficiary claimed to have worked for the Petitioner beginning on May 16, 2006.

In determining the petitioner's ability to pay the beneficiary's 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. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>2</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In addition, when a petitioner has filed immigrant petitions for multiple beneficiaries, USCIS will consider the petitioner's overall financial ability to pay the proffered wages of all its I-140 beneficiaries who have not yet adjusted to lawful permanent resident status because these other filings may have an impact on the petitioner's continuing ability to pay the instant beneficiary. If USCIS were to focus exclusively on individual cases without regard to petitions for other I-140 beneficiaries, it is possible that the petitioner's yearly net income or net current assets could exceed the proffered wage, or the shortfall in wages paid, of that individual beneficiary; however, the net income and net current assets may be insufficient to cover the proffered wages, or shortfall in wages paid, of all the Petitioner's sponsored I-140 beneficiaries.<sup>3</sup> Thus, comparing figures of net income and net current assets with the proffered wage of the instant beneficiary alone may present an inaccurate view of the petitioner's overall ability to pay that wage when other I-140 beneficiaries have also been sponsored. Accordingly, USCIS may consider a petitioner's ability to pay the

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<sup>2</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>3</sup> Allowing a petitioner to utilize its net income or net current figures in isolation for each sponsored beneficiary could also negatively affect U.S. workers. Although arising in a different jurisdiction, we find a decision from the U.S. Federal Court of Appeals for the Fifth Circuit to be instructive where it held that the purpose of the ability to pay regulation of 8 C.F.R. § 204.5(g)(2) is consistent with the labor certification process under section 212(a)(5)(A)(i) of the Act to ensure that U.S. workers will not be harmed. *Rizvi v. Dep't of Homeland Sec. ex rel. Johnson*, No. 14-20569, 2015 WL 5711445, at \*2 (5th Cir. Sept. 30, 2015). Specifically, in upholding the ability to pay regulation of 8 C.F.R. § 204.5(g)(2), the Fifth Circuit stated:

Viewed in the proper context, [the ability to pay regulation at 8 C.F.R. § 204.5(g)(2)] serves purposes in accord with the statutory duty to grant immigrant status only where the interests of American workers will not be harmed; showing the employer's ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.

2015 WL 5711445, at \*2. Similarly, the ability of USCIS to consider a petitioner's ability to pay the proffered wages of its other I-140 beneficiaries is a reasonable way to determine that it has the continuing ability to pay the beneficiary's proffered wage which inherently protects U.S. workers.

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proffered wages of all its I-140 beneficiaries as of the instant priority date and continuing onward until the beneficiary or other I-140 beneficiaries obtain lawful permanent resident status.<sup>4</sup>

The petitioner submitted Forms W-2 showing wages it paid the beneficiary compared to the proffered wage of \$96,400.00:

Year	Wages paid	Deficiency in wages paid (proffered wage minus wages paid)
2011	\$60,152.50	\$36,247.50
2012	\$18,240.00	\$78,160.00
2013	\$87,552.00	\$8,848.00
2014	\$96,444.80	None

Therefore, the evidence in the record demonstrates that the Petitioner paid the Beneficiary wages that were lower than the proffered wage by \$36,247.50 in 2011, by \$78,160.00 in 2012, and by \$8,848.00 in 2013. Also, the record reflects that the Petitioner sponsored 40 other I-140 beneficiaries who were not paid their full proffered wages in each year from 2011 through 2014. Thus, the Petitioner must demonstrate that it had the ability to pay the difference between the proffered wage and the wages actually paid to the Beneficiary and the Petitioner's other I-140 beneficiaries in 2011, 2012, and 2013.

The following tables reflect the deficiencies in wages paid to the Beneficiary and the Petitioner's other I-140 beneficiaries:

Instant Beneficiary	Petition receipt number	Proffered wage	Amount of wage deficiency (proffered wage minus wages paid)			
			2011	2012	2013	2014
R. S.		\$96,400.00	\$36,247.50	\$78,160.00	\$8,848.00	None

Other I-140 Beneficiaries	Petition receipt number	Proffered wage	Amount of wage deficiencies (proffered wage minus wages paid)			
			2011	2012	2013	2014
I. U.		\$114,296.00	\$49,799.04	\$65,904.46	\$52,399.50	None
A. K.		\$82,000.00	\$10,948.26	\$2,214.00 <sup>5</sup>	None	None
N. P.		\$78,600.00	\$11,273.70 <sup>6</sup>	\$10,430.00	None	None
V. F.		\$78,600.00	None	\$5,931.24	\$7,950.00	None

<sup>4</sup> See also *Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petitioner's approval where the record did not establish the petitioner's ability to pay the beneficiaries of multiple, pending petitions).

<sup>5</sup> Deficiency based on the prorated amount of wages due from January 1, 2012, until January 11, 2012, the date of adjustment to lawful permanent resident status.

<sup>6</sup> Deficiency based on the prorated amount of wages due from the priority date of August 19, 2011, through December 31, 2011, and the pay statements for this period.

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P. G.		\$78,600.00	None	\$3,280.00	None	None
N. M.		\$78,600.00	\$3,558.00 <sup>7</sup>	None	\$6,570.00	None
A. T.		\$96,600.00	\$7,667.40 <sup>8</sup>	\$19,171.32 <sup>9</sup>	None	None
S. A.		\$115,000.00	\$44,788.40	\$1,284.00	None	None
R. T.		\$98,500.00	\$51,068.24	\$44,990.04	\$28,540.00	\$8,633 <sup>10</sup>
R. S.		\$85,000.00	\$14,754.17	\$3,328.00	None	None
A. S.		\$115,000.00	\$89,530.88	\$115,000.00	\$28,842.60	None
S. S.		\$97,500.00	None	\$8,296.10 <sup>11</sup>	\$4,477.60	\$4,247.05
S. S.		\$66,000.00	\$5,380.05	\$3,105.00	\$29,110.00	None
H. R.		\$100,100.00	None	\$22,385.64 <sup>12</sup>	\$23,641.84	\$900
A. G.		\$96,600.00	\$88,848.00	\$55,962.00	\$15,123.17	\$9,126.90
A. D.		\$100,100.00	None	\$18,125.80 <sup>13</sup>	\$10,328.00	None
A. G.		\$96,600.00	\$4,642.40 <sup>14</sup>	\$29,480.00	\$16,312.00	\$184
T. B. C.		\$78,600.00	\$5,621.04 <sup>15</sup>	\$15,600.04	None	None
K. P. S. N.		\$116,400.00	None	\$23,906.80 <sup>16</sup>	\$39,993.40	\$5,000.49
S. S.		\$96,400.00	\$2,137.60 <sup>17</sup>	\$20,509.60	\$4,032.00	None
I. A.		\$78,600.00	\$4,950.78 <sup>18</sup>	\$5,142.40	None	None
P. S.		\$115,600.00	None	\$21,709.20	\$11,430.25	None
N. D.		\$96,400.00	None	\$35,751.60	\$33,035.60 <sup>19</sup>	None

<sup>7</sup> Deficiency based on the prorated amount of wages due from the priority date of July 27, 2011, through December 31, 2011, and the pay statements for this period.

<sup>8</sup> Deficiency based on the prorated amount of wages due from the priority date of July 28, 2011, through December 31, 2011, and the pay statements for this period.

<sup>9</sup> Deficiency based on the prorated amount of wages due from January 1, 2012, until October 15, 2012, the date of adjustment to lawful permanent resident status.

<sup>10</sup> Deficiency based on the prorated amount of wages due from January 1, 2014, until November 3, 2014, the date of resignation.

<sup>11</sup> Deficiency based on the prorated amount of wages due from the priority date of March 23, 2012, through December 31, 2012, and the pay statements for this period.

<sup>12</sup> Deficiency based on the prorated amount of wages due from the priority date of August 1, 2012, through December 31, 2012, and the pay statements for this period.

<sup>13</sup> Deficiency based on the prorated amount of wages due from the priority date of July 17, 2012, through December 31, 2012, and the pay statements for this period.

<sup>14</sup> Deficiency based on the prorated amount of wages due from the priority date of November 1, 2011, through December 31, 2011, and the pay statements for this period.

<sup>15</sup> Deficiency based on the prorated amount of wages due from the priority date of October 21, 2011, through December 31, 2011, and the pay statements for this period.

<sup>16</sup> Deficiency based on the prorated amount of wages due from the priority date of June 28, 2012, through December 31, 2012 and the pay statements for this period.

<sup>17</sup> Deficiency based on the prorated amount of wages due from the priority date of May 25, 2011, through December 31, 2011 and the pay statements for this period.

<sup>18</sup> Deficiency based on the prorated amount of wages due from the priority date of October 25, 2011, through December 31, 2011 and the pay statements for this period.

<sup>19</sup> Deficiency based on the prorated amount of wages due from January 1, 2013, until November 27, 2013, the date of resignation.

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S. K.		\$98,400.00	\$3,152.80 <sup>20</sup>	\$41,880.00	None	None
H. S.		\$115,600.00	None	\$15,411.20 <sup>21</sup>	None	None
S. P.		\$115,502.00	None	\$35,205.52 <sup>22</sup>	\$21,662.00	\$645
K. T.		\$116,000.00	None	\$104,880.00	\$26,368.08	None
S. D.		\$115,502.00	\$115,502.00	\$40,687.25	\$24,422.00	None
J. T.		\$103,525.00	None	None	\$31,477	\$3,214.92
P. T.		\$99,550.00	None	None	\$31,761.80	\$2,418
R. S.		\$99,550.00	None	None	\$30,146.90	None
S. A.		\$61,500.00	\$40,897.50 <sup>23</sup>	None	None	None
S. P.		\$88,718.00	\$38,645.56 <sup>24</sup>	None	None	None
P. C.		\$67,000.00	\$9,652.50	None	None	None
V. E.		\$90,000.00	\$18,980.00	None	None	None
S. B.		\$88,000.00	\$70,900.00	None	None	None
V. T.		\$88,718.00	\$45,938.18 <sup>25</sup>	None	None	None
A. M.		\$114,296.00	\$57,723.30 <sup>26</sup>	None	None	None
E. T.		\$68,723.00	\$16,287.70 <sup>27</sup>	None	None	None
B. M.		\$66,000.00	\$4,053.60 <sup>28</sup>	None	None	None
S. S.		\$172,250.00	None	None	None	\$20,531.96
<b>Total amount of deficiencies in wages paid (including deficiencies in wages paid to the instant Beneficiary)</b>						
			<b>\$852,948.60</b>	<b>\$847,731.21</b>	<b>\$486,471.74</b>	<b>\$54,901.32</b>

If the petitioner does not establish that it employed and paid the beneficiary and its other I-140 beneficiaries an amount at least equal to the proffered wage during the period at issue, 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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111,

<sup>20</sup> Deficiency based on the prorated amount of wages due from October 31, 2011, until December 31, 2011, and the pay statements for this period.

<sup>21</sup> Deficiency based on the prorated amount of wages due from the priority date of June 27, 2012, through December 31, 2012, and the pay statements for this period.

<sup>22</sup> Deficiency based on the prorated amount of wages due from the priority date of August 22, 2012, through December 31, 2012, and the prorated amount of wages due in this period.

<sup>23</sup> Deficiency based on the prorated amount of wages due from January 1, 2011, until September of 2011, the month of resignation.

<sup>24</sup> Deficiency based on the prorated amount of wages due from January 1, 2011, until July 25, 2011, the date of adjustment to lawful permanent resident status.

<sup>25</sup> Deficiency based on the prorated amount of wages due from January 1, 2011, until July 9, 2011, the date of adjustment to lawful permanent resident status.

<sup>26</sup> Deficiency based on the prorated amount of wages due from January 1, 2011, until November 17, 2011, the date of adjustment to lawful permanent resident status.

<sup>27</sup> Deficiency based on the prorated amount of wages due from January 1, 2011, until April 30, 2011, the date of adjustment to lawful permanent resident status.

<sup>28</sup> Deficiency based on the prorated amount of wages due from January 1, 2011, until November 29, 2011, the date of adjustment to lawful permanent resident status.

118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)).<sup>29</sup> 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.*, 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 also Taco Especial*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The Petitioner's tax returns demonstrate its net income for 2011, 2012, 2013, and 2014 as shown below.

- In 2011, the Form 1120S stated net income<sup>30</sup> of \$180,405.
- In 2012, the Form 1120S stated net income of \$230,258.
- In 2013, the Form 1120S stated net income of \$283,300.<sup>31</sup>
- In 2014, the Form 1120S stated net income of \$388,961.

The following chart provides a comparison between the Petitioner's net income and the deficiencies in wages paid to the Beneficiary and the Petitioner's other I-140 beneficiaries.

	2011	2012	2013	2014
<b>Total amount of deficiencies in wages paid</b>	\$852,948.60	\$847,731.21	\$486,471.74	\$54,901.32
<b>Net income</b>	\$180,405	\$230,258	\$283,300	\$388,961

Therefore, for the years 2011, 2012, and 2013, the Petitioner did not have sufficient net income to pay the difference between the proffered wages and the wages paid to the Beneficiary and the

<sup>29</sup> *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

<sup>30</sup> As shown on line 21 of page one of the Petitioner's IRS Form 1120S.

<sup>31</sup> We note that the Petitioner's 2013 tax return is stamped "Do not file." It is unclear whether this is the same as the final tax return and whether this amount would accurately reflect the Petitioner's net income and net current assets for this year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The Petitioner should submit an IRS certified tax transcript in any further filings to resolve this issue.

Petitioner's other I-140 beneficiaries. The Petitioner did have sufficient net income to pay the difference between the proffered wages and the wages paid to these beneficiaries in 2014.

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.<sup>32</sup> 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 2011, 2012, and 2013 as shown in the table below.

- In 2011, the Form 1120S stated net current assets of \$227,371.
- In 2012, the Form 1120S stated net current assets of \$704,598.
- In 2013, the Form 1120S stated net current assets of \$992,691.
- In 2014, the Form 1120S stated net current assets of \$3,536,555.

The following chart provides a comparison between the Petitioner's net current assets and the deficiencies in wages paid to the Beneficiary and the Petitioner's other I-140 beneficiaries.

	2011	2012	2013	2014
<b>Total amount of deficiencies in wages paid</b>	\$852,948.60	\$847,731.21	\$486,471.74	\$54,901.32
<b>Net current assets</b>	\$227,371	\$704,598	\$992,691	\$3,536,555

Thus, for 2011 and 2012, the Petitioner did not have sufficient net current assets or net income to pay the remainder of the proffered wage to the Beneficiary and all of its other I-140 beneficiaries. The Petitioner would have sufficient net current assets to pay the difference between the proffered wages and the wages paid to these beneficiaries in 2013 (upon confirmation of its filed tax return) and 2014.

Therefore, from the date the labor certification was accepted for processing by DOL, the Petitioner has not established that it had the continuing ability to pay the proffered wages to the Beneficiary and all of the Petitioner's other I-140 beneficiaries as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, the Petitioner cites a report prepared by its accountant who states that \$2 million in software development costs were allocated as expenditures from 2009 to 2014, and that these expenses are considered under Generally Accepted Accounting Principles (GAAP) to be considered

<sup>32</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).



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as capital of the company even though it may be written off as an expense for tax purposes. We note that it is unclear whether the figures cited by the Petitioner's accountant for software development costs are included on its IRS Form 1120S, Schedule L. As stated above, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6, and its year-end current liabilities are shown on lines 16 through 18. The Petitioner has not established how these business expenditures would increase its net current assets as the Petitioner's accountant claims. It is also unclear how these costs negatively affected the Petitioner's business. Since the expenses are from 2009 to 2014, it is unclear that these expenses would be an unusual or a one-time expense, especially in light of the fact that the Petitioner is in the computer industry and the Petitioner might require routine software upgrades in order to maintain its business. Therefore, we will not consider these software development costs as demonstrating the Petitioner's ability to pay the remainder of the proffered wage to the Beneficiary and its other I-140 beneficiaries.

The report from the Petitioner's accountant also indicates that the Petitioner's president owns three office spaces either directly as an individual or indirectly through his company, [REDACTED]. The accountant states that the Petitioner makes optional rent payments to the Petitioner's president and to [REDACTED] that should be excluded as part of the Petitioner's expenses and added to its net income. First, we note that the petitioner has not provided any evidence establishing the ownership of these office spaces. Second, the Petitioner is essentially claiming that it is one and the same with the shareholder, which is not correct. For tax purposes, the corporate petitioner gets a deduction for the rents it pays to the shareholder (which is included in our calculation of net income), and the shareholder shows the rent payments as income on his IRS Form 1040, Schedule E. The shareholder also is able to claim depreciation for the property on IRS Form 1040, Schedule E. The Petitioner wants us take the net income figure from line 21 of page one of its Form 1120S and add back rents from line 11. However, rents are already accounted for in the calculation of line 21 net income, and there is no evidence that the Petitioner could reduce the rent paid to the shareholder in order to pay the proffered wage.<sup>33</sup>

"[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining the petitioner's ability to pay." *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added). The Petitioner has not provided sufficient legal support for the assertion that these rent payments should be added back to net income. 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). Therefore, we will not add rent payment costs to the Petitioner's net income or net current assets.

In addition, the Petitioner states that we should consider the average monthly balance in its business checking account summaries. We disagree. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a

<sup>33</sup> The Petitioner must pay the fair rental value for the property. Rents below fair rental value may be adjusted by the IRS. See I.R.C. § 482.

proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L as discussed above in determining the petitioner’s net current assets.

On appeal, the Petitioner asserts that it has the ability to pay the proffered wages to the instant Beneficiary and the other I-140 beneficiaries through an assessment of the totality of the circumstances. As stated above, USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Sonogawa*, 12 I&N Dec. at 614-15.

The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner’s ability to pay the proffered wage.

In the instant case, the tax returns in the record and the Form I-140 indicate that the Petitioner has been in business since 2004. The Form I-140 states that the Petitioner employs 95 workers.<sup>34</sup> The Petitioner has submitted tax documentation from 2010 to 2014 as well as Forms W-2 and other pay

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<sup>34</sup> We note that from the date of incorporation, the Petitioner has filed 535 H-1B petitions and 97 I-140 petitions. We note that these figures may include petitions to extend H-1B status for certain beneficiaries or I-140 petitions for already employed H-1B workers, and some of these H-1B and I-140 beneficiaries may no longer work for the Petitioner.

records. Although the priority date of the instant petition is November 17, 2011, we will consider the Petitioner's 2010 tax return in relation to the Petitioner's historical growth assertions only in the totality of the circumstances under *Sonegawa*, 12 I&N Dec. at 614-15. An assessment of the history of deficiencies in wages paid to the Beneficiary and the Petitioner's other I-140 beneficiaries from 2010, just before the priority date in this matter, to 2013 is significant. The record demonstrates that the deficiencies in wages paid to these I-140 beneficiaries amounted to \$906,185.67; \$852,948.60; \$847,731.21; and \$486,471.74 in 2010, 2011, 2012, and 2013, respectively, as shown in the table below.<sup>35</sup>

Year	Deficiencies in wages paid	Net income	Net current assets
2010	\$906,185.67	\$157,658	\$186,734
2011	\$852,948.60	\$180,405	\$227,371
2012	\$847,731.21	\$230,258	\$704,598
2013	\$486,471.74	\$283,300	\$992,691
2014	\$54,901.32	\$388,961	\$3,536,555

This table indicates that the Petitioner's tax returns for 2010, the year just before the priority date, for 2011, the year of the priority date, and for 2012 each show a fairly large gap between the amounts of net income and net current assets compared to the total proffered wage obligations.

The Petitioner states that its gross receipts have increased year-to-year from 2010 to 2014 by almost double, yet despite this as shown above, the Petitioner still showed significant deficiencies between its proffered wages and wages paid. While the Petitioner is not required to pay the proffered wage until the time of adjustment to lawful permanent resident status, these wage deficiencies compared to net income and net current assets reflect negatively on the Petitioner's ability to pay the proffered wage from the priority date onward and should be considered in relation to the totality of the circumstances. As stated above, one purpose of the ability to pay regulation at 8 C.F.R. § 204.5(g)(2) is to safeguard the interests of U.S. workers. *See Rizvi v. Dep't of Homeland Sec. ex rel. Johnson*, No. 14-20569, 2015 WL 5711445, at \*2 (5th Cir. Sept. 30, 2015). In filing for a foreign national, the petitioner attests in Part N of the ETA Form 9089 that it has the funds available to pay the salary to the worker and that the job has been and is clearly open to U.S. workers.

The Petitioner also states that in 2014 alone it invested in software development and commercial real estate ventures totaling over \$4 million. As stated above, the years at issue here are 2011 and 2012, not 2014. The Petitioner's accountant states that \$2 million were allocated as software development costs from 2009 to 2014. However, as noted above, the Petitioner's business is in the computer industry and software development and upgrades might be continually required to remain competitive. As these costs occurred between 2009 and 2014, they would not be considered as a

<sup>35</sup> These figures represent deficiencies in wages paid after prorating certain periods as demonstrated by the Petitioner. The deficiency in wages paid to the Petitioner's other beneficiaries decreased in 2014, amounting to \$54,901.32 when the company's net current assets substantially increased.

one-time or unusual expense. The Petitioner has not demonstrated the existence of any unexpected business expenses in 2011 or 2012. While we acknowledge the positive growth the Petitioner has experienced in its gross receipts and net current assets from 2012 through 2014, in the totality of the circumstances this does not outweigh the amount of deficiencies in wages paid for 2011 and 2012, which cannot be overcome after considering the Petitioner's net income or net current assets,<sup>36</sup> especially in light of the fact that there has been a history of having deficiencies in wages paid to I-140 beneficiaries from 2010 through 2012 compared to net income and net current assets. Despite the positive growth of the Petitioner's business in 2014, the ability to pay the proffered wage must be established from the priority date of November 17, 2011, onward. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the Petitioner has not established its ability to pay the proffered wage beginning on the priority date.

## II. CONCLUSION

The evidence submitted does not establish that the Petitioner had the ability to pay the proffered wage as of the priority date.

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). The Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-C-, Inc.*, ID# 90551 (AAO Mar. 8, 2017)

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<sup>36</sup> USCIS will consider separately, but not in combination, a petitioner's net income and net current asset figures to determine its ability to pay the proffered wage as of the priority date. Net income represents the amount of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Accordingly, we consider net income and net current assets separately toward a petitioner's ability to pay the proffered wage.