U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 12 2014 OFFICE: TEXAS SERVICE CENTER FILE:

Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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 employment-based visa petition was denied by the Director, Texas Service Center (director). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO twice reopened the case on the petitioner's motion, and both times the appeal was again dismissed by the AAO. The matter is again before the AAO on a motion to reopen and motion to reconsider. The motion to reopen will be granted. The previous decisions of the AAO to dismiss the appeal will be affirmed and the petition will remain denied.

The petitioner describes itself as an ethnic food and specialty store. It seeks to employ the beneficiary permanently in the United States as a specialty chef. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary was qualified for the position. The director denied the petition accordingly. We affirmed the director's decision.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

As set forth in our previous decisions, the issues in this case are whether the petitioner established the beneficiary's three years of prior work experience as a specialty chef as required in the approved labor certification, whether the petitioner has established the ability to pay the proffered wage as of the priority date, and whether the petitioner has resolved discrepancies in its Federal Employer Identification Number (FEIN).

The Minimum Requirements of the Offered Position

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading

and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Knowledge of ethnic cuisine.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an in Washington, DC, from August 22, 2001, until July 31, 2004. We note that this claim amounts to only 34 months of experience. Although the labor certification requests the beneficiary to list all former work experience that would qualify the beneficiary for the position, no other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains the following letters of experience for the beneficiary:

- an experience letter from Ambassador Extraordinary and of to the United States of America on his letterhead, dated April 7, 2001, stating that the embassy employed the beneficiary as a chef from November 1996 until September 1999;
- an experience letter from Deputy Chief of Mission to the Embassy of the not on Embassy letterhead, dated June 15, 2004, stating that the beneficiary was employed from August 2000 through the date of the letter as a chef;

- an experience letter from , Ambassador Extraordinary and to the United States of America on embassy letterhead, stating he has known the beneficiary as a chef from August 2001 until October 2003;[1]
- a second experience letter from Mr. dated December 10, 2006, stating that the beneficiary was employed as the Ambassador's Chef; however, the experience letter does not contain the beneficiary's dates of employment; and,
- an experience letter from , Ambassador, on Embassy of letterhead, dated June 15, 2004, claiming that the beneficiary was employed as a cook from October 2001 until June 2004 at the Embassy of the in Washington, DC.

On October 12, 2004, the beneficiary executed a Form G-325 Biographic Information in connection with an application to adjust status to lawful permanent residence, in which he indicated that he worked for from 1996 through August 2001. The Form G-325 signed by the beneficiary, under penalty of perjury, is in direct conflict with the experience letters above, which claim that the beneficiary worked for the Embassy in Washington D.C. from 1996 to 1999 and 2000 until 2004.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> It is incumbent on 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… Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

On June 9, 2006, the beneficiary executed another Form G-325 in connection with a second application to adjust status, in which he indicated that he worked as a chef in from 1978 through August 2001.

In the instant motion, counsel asserts that we "erred in dismissing completely the work experience of the beneficiary in the United States during his first A-2 stay as employee of the Embassy at Washington DC." However, the petitioner has still failed to rectify the discrepancy between the employment letters and the beneficiary's own claimed employment history as stated on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On the ETA Form 9089 the beneficiary listed employment at the Embassy from August 22, 2001, until July 31, 2004, only. The beneficiary did not list employment with the

[1] This undated experience letter provides about 26 months of possible experience as a specialty chef with the Embassy of

Embassy from November 1996 until September 1999 or from August 2000 through June 15, 2004. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted.

Counsel also asserts on motion that "the alleged conflicting information of the Form G-325 is at most confusing but certainly not conflicting." Counsel explained that the beneficiary was working the two jobs simultaneously and noted "there is no reason why a person cannot hold two jobs at one time." While counsel is correct in stating that it is not uncommon for a person to hold two jobs at the same time, counsel's explanation seems to disregard the sheer distance between the the beneficiary's two claimed jobs in Counsel's explanation also fails to explain why the beneficiary claimed on two separate Forms G-325 that his only employment prior to 2001 was for in Uzbekistan and that he lived in Uzbekistan until August 2001. Finally, counsel does not explain why, if the beneficiary was working two jobs simultaneously from 1996 through 2001, he claimed neither of these jobs on the labor certification, which specifically solicits claims of employment that would establish his eligibility for the offered position.

We affirm the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Federal Employer Identification Number

The petitioning entity, listed its Federal Employer Identification Number (FEIN) as on the Form I-140 petition; this is not the same as the entity that filed the ETA Form 9089, Application for Permanent Employment Certification, which listed its name as ' ' and claimed to operate under FEIN Counsel states on motion that the labor certification application and the Form I-140 petition were both filed by the same company and speculates that the use of FEIN on the petition was either "a typographical error" or that this FEIN was used by the petitioner's first attorney "to defraud the Petitioner and the USCIS."

Counsel speculated that this FEIN may have been "used by the petitioner's first attorney Sergei to defraud the Petitioner and the USCIS." Counsel submitted news accounts of Mr. s convictions for immigration fraud. The record reveals that this FEIN was listed on the Form I-140 petition that was filed for ' ' by attorney on December 2, 2004]. However, the record also reveals that this FEIN was listed on the instant Form I-140 petition that was filed for ' ' by attorney on September 7, 2007. Since there is no indication that Mr. was involved with the filing of the instant petition, current counsel's assertion on motion that Mr. was responsible for using this FEIN on the petition is unsupported.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to resolve the discrepancy between the FEIN listed on the labor certification and that listed on the petition.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on June 22, 2006. The proffered wage as stated on the ETA Form 9089 is $11.60 per hour ($24,128 per year).

The evidence in the record of proceeding shows that the entity that filed the labor certification is structured as a multi-member LLC S corporation. There are no tax returns for the petitioner in the record. The tax returns in the record belong to [redacted] LLC, a company that was formed in 2002 and whose fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 40 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner, FEIN has not demonstrated that it paid the beneficiary any wages.

For the purposes of this discussion, we will examine the evidence in the record as if the petitioner has established that it is the same business as LLC. LLC paid the beneficiary $23,137.88 in 2006 and $1,001.40 in 2009, which is less than the proffered wage. The record establishes that LLC paid the beneficiary more than the proffered wage in 2007 and 2008. Thus, assuming the relationship with were established, the petitioner would have to demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2006 and 2009, a difference of $990.12 and $23,126.60, respectively. The petitioner must also demonstrate its ability to pay the full proffered wage from 2010 onward.

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

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

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

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation

> of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

The record before us closed on December 2, 2013 with our receipt of the petitioner's submissions in response to our Notice of Intent to Dismiss (NOID) dated October 31, 2013. As of that date, the petitioner's 2013 federal income tax return was not yet due. Therefore, the income tax return of LLC for 2012 is the most recent return available. The tax returns in the record relate to LLC and demonstrate LLC's net income for 2006, 2009, 2010, 2011, and 2012 as shown in the table below.

- In 2006, the Form 1120S stated net income[2] of $2,286.
- In 2009, the Form 1120S stated net income of -$34,542.
- In 2010, the Form 1120S stated net income of -$55,162.
- In 2011, the Form 1120S stated net income of -$49,379.
- For 2012, the Form 1120S stated net income of -$34,111.

On October 31, 2013, we notified the petitioner and counsel that we had identified three additional beneficiaries sponsored by the petitioner. The petitioner through counsel responded on December 2, 2013 and claimed that two of the beneficiaries no longer worked for the petitioner. The petitioner provided no evidence that the petitions for these additional beneficiaries were ever withdrawn. Thus, the petitioner has failed to establish that it had sufficient net income to establish its ability to pay the beneficiary and three additional beneficiaries the proffered wage for 2006, 2009, 2010, 2011, and 2012.[3] *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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[2] 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.

[3] The petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16

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.[4] 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. LLC's tax returns demonstrate its end-of-year net current assets for 2006, 2009, 2010, 2011, and 2012 as shown in the table below.

- In 2006, the Form 1120S stated net current assets of $414,249.
- In 2009, the Form 1120S stated net current assets of $139,933.
- In 2010, the Form 1120S stated net current assets of $79,849.
- In 2011, the Form 1120S stated net current assets of $42,722.
- For 2012, the Form 1120S stated net current assets of -$10,704.

For the years 2006, 2009, 2010, 2011, and 2012, LLC's failure to provide evidence for all of its sponsored workers has prevented us from determining the petitioner's ability to pay the proffered wage for four workers out of its net current assets. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, or its net income or net current assets.

Counsel asserts on motion that the beneficiary will replace another employee once the immigrant petition becomes approved. The evidence in the record names the worker, contains competent evidence of the wages paid and full-time employment, verifies that their duties are those of the proffered position as set forth on the ETA Form 9089, and contains evidence that the petitioner has replaced or will replace the worker with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary for 2011, 2012, and 2013.[5] Nevertheless, the petitioner must still establish

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I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The failure of the petitioner to provide this evidence cannot be excused.

[4] 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.

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

the ability to pay all of its sponsored workers. Even though we may credit the wages of the one worker back to the petitioner, the record still does not reflect the proffered wages of the other beneficiaries, and whether and/or how much each was paid.

The petitioner has not established its ability to pay the proffered wage to all of its beneficiaries in 2006 and from 2010 onward. On motion the petitioner states that we have made a mistake and confused the petitioner with another company. USCIS records reflect that LLC, FEIN filed a Form I-140 petition on October 26, 2005, and another Form I-140 petition on June 4, 2007. USCIS records reveal the same petitioner, the same address, the same FEIN, and the same company representative on each of these petitions. Thus, the petitioner's claim that it did not file other petitions is not persuasive.

Counsel notes on motion that the two other Form I-140s cited by USCIS have been approved. Counsel suggests that the approval of these petitions is evidence that the beneficiaries in those cases had both been paid the proffered wage. However, the record does not contain any evidence of the wages paid to these other beneficiaries and the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Considering the discrepant FEINs used in the current petition, it cannot be assumed that USCIS was aware of the existence of multiple petitions by the same petitioner when the previous petitions were adjudicated.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

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

In the instant case, the petitioner appears to have been in business since 1996 and employs 40 workers. The petitioner shows its gross receipts and wages paid to its workers have lowered over time. Over the last three years, the petitioner has reported negative net income. Further, its net current assets have also reduced over time. The record is silent concerning the petitioner's reputation within its industry, the occurrence of any uncharacteristic business expenditures or losses, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Conclusion

In summary, the petitioner failed to establish that the beneficiary satisfies the requirements stated on the labor certification. The petitioner also failed to establish the ability to pay the proffered wage. Therefore, the beneficiary does not qualify for classification as professional or skilled worker under section 203(b)(3) of the Act. The director's decision denying the petition is affirmed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is granted and our dismissal of the appeal is affirmed. The petition remains denied.