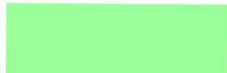


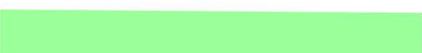


U.S. Citizenship
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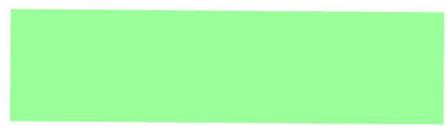


DATE: **AUG 09 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).¹ The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 23, 2009 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification,

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

(b)(6)

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.50 per hour (\$28,080 per year based on forty hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered as a cook.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On May 2, 2012, the AAO issued a Notice of Intent to Dismiss and Request for Evidence and Notice of Derogatory Information (NOID). A response was received on May 31, 2012.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). The petition and the Form ETA 750 list the petitioner's name as "Saraceno Restaurant" and the address as [REDACTED]. The Form 1120 tax returns submitted with the petition list the petitioner's name as "FP Restaurant Inc. D/B/A Saraceno Restaurant" with an address of [REDACTED]. A search of the Westlaw database shows that the employer identification number (EIN) listed on the petition and the tax returns [REDACTED] belongs to "[REDACTED]" with an address of [REDACTED]. Information in the Westlaw database reflects that this address belongs to [REDACTED] an Italian restaurant owned by [REDACTED]. In its NOID dated May 2, 2012, the AAO requested evidence to verify the petitioner's name and address, stating "Any evidence submitted must clearly indicate that your organization is authorized to do business under another name. Evidence submitted must also verify the employer identification number assigned to your organization."

In response to the AAO's notice, the petitioner submitted a letter from its accountant, indicating that FP Restaurant Inc. is the corporate name registered with the Internal Revenue Service (IRS) for both [REDACTED] and [REDACTED]. The letter also states that the two restaurants are adjacent to one another and share kitchen space and employees, as the restaurants are a family business under the same management of [REDACTED]. The petitioner also submitted a printout of its 2012 annual report from the [REDACTED] of Massachusetts, confirming that the EIN listed on the petition and tax returns belongs to [REDACTED]. However, no documentation was submitted to establish that "Saraceno Restaurant" is a fictitious name or "Doing Business As" (DBA) for [REDACTED]. According to the U.S. Small Business Administration website, Massachusetts requires anyone who

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

is conducting business under an alias (i.e., any name other than their own), including corporations, to file a business certificate (“doing business as”) in the city or town where the business is principally headquartered. See <http://www.sba.gov/content/register-your-fictitious-or-doing-business-dba-name/> (accessed July 16, 2012). Therefore, the petitioner has not established that [REDACTED] and [REDACTED] are DBAs for [REDACTED]

However, even if the AAO accepted the financial documents submitted for [REDACTED] as belonging to the petitioner, the petitioner still has not established the ability to pay the beneficiary the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1987, to have a gross annual income of \$1,271,990, and to currently employ eight workers. According to the tax returns in the record, the petitioner’s fiscal year is from April 1st to March 31st. On the Form ETA 750B, signed by the beneficiary on June 15, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary’s Forms W-2 for 2006, and 2008 through 2011.³ The beneficiary’s Forms W-2 demonstrate that the beneficiary was compensated by the petitioner as shown in the table below.

- In 2006, the Form W-2 stated wages of \$7,884.
- In 2008, the Form W-2 stated wages of \$16,335.80.
- In 2009, the Form W-2 stated wages of \$16,369.65.
- In 2010, the Form W-2 stated wages of \$16,992.80.

³ Although the record indicates that the beneficiary began employment with the petitioner on July 30, 2006, no Form W-2 for 2007 was submitted.

- In 2011, the Form W-2 stated wages of \$20,361.80.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before 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 at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the AAO closed on May 31, 2012 with the receipt by the AAO of the petitioner’s submissions in response to the AAO’s request for evidence. As of that date, the petitioner’s 2012 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2011 is the most recent return available. The tax returns for the petitioner demonstrate its net income as shown in the table below.

- In 2001, the Form 1120 stated net income of \$54,116.
- In 2002, the Form 1120 stated net income of \$33,954.
- In 2003, the Form 1120 stated net income of \$18,066.
- In 2004, the Form 1120 stated net income of -\$8,299.
- In 2005, the Form 1120 stated net income of -\$8,241.
- In 2006, the Form 1120 stated net income of -\$24,768.
- In 2007, the Form 1120 stated net income of -\$20,157.
- In 2008, the Form 1120 stated net income of -\$97,710.
- In 2009, the Form 1120 stated net income of \$68,825.
- In 2010, the Form 1120 stated net income of \$12,720.
- In 2011, the Form 1120 stated net income of \$40,069.

Therefore, for the years 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary. Although the petitioner’s net income in 2001 and 2002, was higher than the proffered wage, the petitioner has filed Form I-140 for multiple workers.⁴ Therefore,

⁴ In its May 31, 2012 response to the AAO’s notice, counsel states, “...petitioner represents that to the best of his knowledge there is no other pending I-140, nor there is *[sic]* a beneficiary waiting for adjustment of status based on an I-140 from this petitioner.” However, Service records show the following I-140 petitions filed for [REDACTED] Restaurant:

- [REDACTED] Approved 9/19/03, priority date 4/30/01
- [REDACTED] Approved 12/18/03, priority date 4/30/01
- [REDACTED] Approved 11/3/03, priority date 4/30/01

Service records indicate that the beneficiaries of these petitions adjusted status to lawful permanent resident in 2004 and 2005. Therefore, the petitioner must establish its ability to pay the proffered wage to all beneficiaries of its petitions from 2001 until the date each beneficiary adjusted status.

the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax returns for the petitioner demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$187,848.
- In 2002, the Form 1120 stated net current assets of -\$114,891.
- In 2003, the Form 1120 stated net current assets of -\$39,000.
- In 2004, the Form 1120 stated net current assets of -\$54,635.
- In 2005, the Form 1120 stated net current assets of -\$57,483.
- In 2006, the Form 1120 stated net current assets of -\$560.
- In 2007, the Form 1120 stated net current assets of \$91,632.
- In 2008, the Form 1120 stated net current assets of \$93,870.
- In 2009, the Form 1120 stated net current assets of \$95,331.
- In 2010, the Form 1120 stated net current assets of \$107,346.
- In 2011, the Form 1120 stated net current assets of \$105,101.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of

⁵According 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.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts the petitioner does have the ability to pay the proffered wage and states that the director erred in not considering depreciation and the petitioner's bank statements. As mentioned above, with respect to depreciation, "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). See also *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).

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. 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 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 that was considered in determining the petitioner's net current assets.

Counsel also refers to USCIS memorandums and decisions issued by the AAO concerning ability to pay. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") See also Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda

fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to ‘inform rather than control.’” CRS at p.3 citing to *American Trucking Ass’n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). See also *Pacific Gas & Electric Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974), “A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.” The memo notes that “policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” Id. at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Counsel also states, “If the employer had hired the beneficiary/alien instead of the ones he hired in the four years in question (2003 – 2006) he would have been able to pay the alien as he has in fact paid the other employee he had to hire while processing this petition.”⁶ The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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

⁶ 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 category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

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.

In the instant case, the petitioner has been in business since 1987. Although the petitioner states that the number of employees has grown from 10 workers in 2001 to 19 currently, the petitioner's gross receipts decreased from 2001 through 2011. In addition, the petitioner's net income was negative from 2004 through 2008 and the petitioner's net current assets were negative from 2001 through 2006. The tax returns for 2003, 2004, 2005, and 2006 fail to demonstrate the ability to pay the beneficiary the proffered wage through net income or net current assets. Although the petitioner's net income was higher than the proffered wage for 2001 and 2002, the petitioner has filed multiple Form I-140 petitions. The petitioner submitted no evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. The petitioner submitted an undated article from [REDACTED] discussing the petitioner. The article does not provide a review of the petitioner or discuss its reputation. Additional information, in the form of printouts of various internet sites on the [REDACTED] was also submitted. However, no explanation or evidence was provided regarding The North End Scene's significance in the petitioner's industry or its circulation, or the significance of the other materials submitted. No other evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. Counsel also failed to provide evidence of any factors that may have impacted the petitioner during the relevant years. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

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 appeal is dismissed.