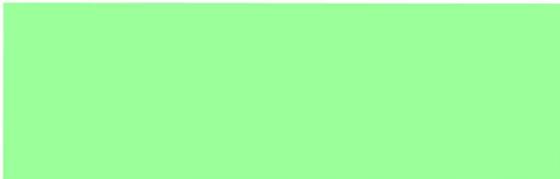


(b)(6)

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

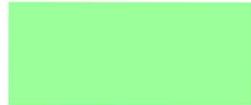


U.S. Citizenship  
and Immigration  
Services



DATE **SEP 27 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE:

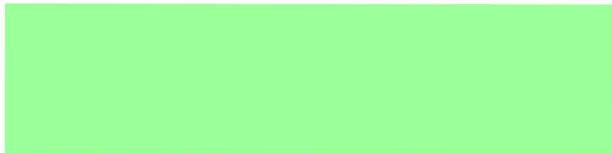


IN RE: Petitioner:  
Beneficiary:



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,

*Kiera Polos for*

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

The record shows that the appeal is properly filed and 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 August 13, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on February 10, 1997. The proffered wage as stated on the Form ETA 750 is \$16.76 per hour (\$34,860 per year based on 40 hours per week).

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.<sup>1</sup>

The record indicates the petitioner operated as a sole proprietorship from 1997 to 1998 and as a domestic general partnership from 1999 to the present. On the petition, the petitioner claimed to have been established in March 1987 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on January 31, 1997, the beneficiary claimed to have worked for the petitioner since March 1990.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 demonstrated that it paid the beneficiary wages as shown in the table below:

- In 1997, the IRS Form W-2 shows wages paid of \$15,425.40.
- In 1998, the IRS Form W-2 shows wages paid of \$23,837.50.
- In 1999, the IRS Form W-2 shows wages paid of \$21,360.50.
- In 2000, the IRS Form W-2 shows wages paid of \$24,312.12.
- In 2001, the IRS Form W-2 shows wages paid of \$27,007.75.
- In 2002, the IRS Form W-2 shows wages paid of \$27,990.

---

<sup>1</sup> 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).

- In 2003, the IRS Form W-2 shows wages paid of \$28,975.50.
- In 2004, the IRS Form W-2 shows wages paid of \$31,184.
- In 2005, the IRS Form W-2 shows wages paid of \$35,699.08.
- In 2006, the IRS Form W-2 shows wages paid of \$39,550.
- In 2007, the IRS Form W-2 shows wages paid of \$41,230.

For the years 2005, 2006 and 2007, the petitioner has established that it paid the beneficiary the proffered wage. The petitioner paid the beneficiary less than the proffered wage each year from 1997 to 2004. Thus, the petitioner must demonstrate that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 1997 through 2004, as represented in the following table:

- In 1997, difference of \$19,434.60.
- In 1998, difference of \$11,022.50.
- In 1999, difference of \$13,499.50.
- In 2000, difference of \$10,547.88.
- In 2001, difference of \$7,852.25.
- In 2002, difference of \$6,870.
- In 2003, difference of \$5,884.50.
- In 2004, difference of \$3,676.

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 (1<sup>st</sup> 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food*, 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).

The record before the director closed on July 15, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal tax return was not yet due. Therefore, the petitioner’s tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 1997 to 2004, as shown in the table below.

- In 1997, the sole proprietor’s Form 1040 stated adjusted gross income<sup>2</sup> of \$6,539.

---

<sup>2</sup> For 1997 to 1998, the petitioner operated as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm’r 1984). Therefore the sole proprietor’s adjusted gross income, assets and personal liabilities are also considered as part of the petitioner’s ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. The petitioner’s adjusted gross income is found on line 32 for 1997 and line 33 for 1998. Further, sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*,

- In 1998, the sole proprietor's Form 1040 stated adjusted gross income of \$2,215.
- In 1999, the petitioner's Form 1065 stated net income<sup>3</sup> of \$(21,398).
- In 2000, the petitioner's Form 1065 stated net income of \$10,480.
- In 2001, the petitioner's Form 1065 stated net income of \$(48,151).
- In 2002, the petitioner's Form 1065 stated net income of \$(15,990).
- In 2003, the petitioner's Form 1065 stated net income of \$(11,930).
- In 2004, the petitioner's Form 1065 stated net income of \$(19,759).

In 1997 and 1998, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$34,860. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the difference between the wages paid and the proffered wage. For the years 1999 to 2004, the petitioner has not established that it had sufficient net income to pay the difference between the wages paid and the proffered wage.

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.<sup>4</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net

---

539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

<sup>3</sup> For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page 1 of the Form 1065, U.S. Partnership Income Tax Return. The petitioner's net income is found on line 22 of page 1 of the petitioner's tax returns for 1999, 2000, 2001 and 2004. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedule K has relevant entries for additional income, credits, deductions and other adjustments for 2002 and 2003. Therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K for those years.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 1999 to 2004, as shown in the table below.<sup>5</sup>

- In 1999, the petitioner's Form 1065 stated net current assets of \$0.
- In 2000, the petitioner's Form 1065 stated net current assets of \$(25,877).
- In 2001, the petitioner's Form 1065 stated net current assets of \$(70,858).
- In 2002, the petitioner's Form 1065 stated net current assets of \$(67,616).
- In 2003, the petitioner's Form 1065 stated net current assets of \$(63,776).
- In 2004, the petitioner's Form 1065 stated net current assets of \$24,212.

For the year 2004, the petitioner has established that it had sufficient net current assets to pay the difference between the wages paid and the proffered wage. For the years 1997 to 2003, the petitioner has not established that it had sufficient net current assets to pay the proffered wage.

On appeal, counsel asserts that the sole proprietor had sufficient personal assets to pay the difference between the wages paid and the proffered wage. The petitioner provided a list of assets that included five cars and three real estate properties. The record does not contain evidence to establish the value of any of the cars, including the condition that cars were in, or any liens thereon. Regarding the sole proprietor's property values, real estate is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such significant personal assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also asserts that the petitioner's general partners have sufficient personal assets to pay the difference between the wages paid and the proffered wage. A general partnership consists of two or more partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage.

The petitioner is comprised of three partners, [REDACTED]. The AAO will consider the personal assets, expenses and liabilities of each partner separately.

---

<sup>5</sup> The petitioner did not submit audited financial statements to establish its net current assets for 1997 and 1998.

The first partner is [REDACTED]. For 1999 to 2003, copies of his individual tax returns were provided and reflect his income as reflected in the table below.

- In 1999, [REDACTED] Form 1040 stated adjusted gross income of \$35,465.
- In 2000, [REDACTED] Form 1040 stated adjusted gross income of \$54,120.
- In 2001, [REDACTED] Form 1040 stated adjusted gross income of \$40,130.
- In 2002, [REDACTED] Form 1040 stated adjusted gross income of \$55,619.
- In 2003, [REDACTED] Form 1040 stated adjusted gross income of \$55,649.

An estimate of expenses was provided for [REDACTED] for 1999 to 2003 to support himself and his family of five as reflected in the table below.

- For 1999, yearly expenses of \$10,800.
- For 2000, yearly expenses of \$11,400.
- For 2001, yearly expenses of \$17,400.
- For 2002, yearly expenses of \$22,080.
- For 2003, yearly expenses of \$25,680.

The AAO notes that [REDACTED] estimate of monthly expenses does not appear to include all of the expenses for a family of five. The estimate includes mortgage/rent and household expenses for 1999 to 2001 and mortgage/rent, household and car payment for 2002 to 2003. The petitioner's estimate for household expenses for a family of five for 1999 is \$400 and \$450 for 2000 to 2003. The petitioner's estimate did not include utilities, car insurance, gas, car maintenance, health insurance, medical, taxes, gifts, clothing or food. Although some of these expenses could be attributed to the general category of household expenses, it is unclear how all of those expenses could be accounted for by \$400 to \$450 per month for a family of five. This casts doubt on the petitioner's estimate of monthly expenses.

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

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.

Thus, the AAO does not accept [REDACTED] estimate of monthly expenses. Bank statements for [REDACTED] were provided for 2005 to 2008. However, evidence of money in his bank account from 2005 to 2008 does not establish his assets from 1999 to 2003. Bank statements for [REDACTED] were not provided for 1999 to 2003. As such, the petitioner has not demonstrated that [REDACTED] assets may be utilized to pay the difference between the wages paid and the proffered wage.

The second partner is [REDACTED]. Copies of her individual tax returns were provided for 1999, 2001, 2002 and 2003. Tax returns were not provided for 2000. Her adjusted gross income is reflected in the table below.

- In 1999, [REDACTED] Form 1040 stated adjusted gross income of \$5,448.
- In 2001, [REDACTED] Form 1040 stated adjusted gross income of \$9,805.
- In 2002, [REDACTED] Form 1040 stated adjusted gross income of \$20,874
- In 2003, [REDACTED] Form 1040 stated adjusted gross income of \$28,405.

An estimate of expenses was provided for [REDACTED] for 1999 to 2003 to support herself and her family of two as reflected in the table below.

- For 1999, yearly expenses of \$22,320.
- For 2001, yearly expenses of \$32,040.
- For 2002, yearly expenses of \$34,440.
- For 2003, yearly expenses of \$37,510.

[REDACTED] adjusted gross income fails to cover her yearly expenses. It is improbable that she could pay the difference between the wages paid and the proffered wage and support her and her family of two on a deficit. Bank statements for [REDACTED] were provided for 2005 to 2008. However, evidence of money in her bank account from 2005 to 2008 does not establish her assets from 1999 to 2003. Bank statements for [REDACTED] were not provided for 1999 to 2003. The record of proceeding does not establish that [REDACTED] had sufficient personal assets to pay the difference between the wages paid and the proffered wage.

The third partner is [REDACTED]. A copy of her 2001 individual income tax return was provided. Her adjusted gross income for 2001 was \$47,065. An estimate of her expenses to support her family of two was provided in the amount of \$31,200. Her estimate does not appear to include all of the expenses for her family of two. Her estimate did not include charitable gifts. Her 2001 tax return indicates charitable contributions in the amount of \$3,997.

*Matter of Ho*, 19 I&N at 591, states:

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.

Thus, the AAO does not accept [REDACTED] estimate of monthly expenses. As such, the petitioner has not demonstrated that [REDACTED] assets may be utilized to pay the difference between the wages paid and the proffered wage.

Thus, 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 the

priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, from the priority date of February 10, 1997 onward, for all relevant years.

On appeal, counsel asserts that since the petitioner is currently paying the beneficiary at the proffered wage rate, according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The Yates Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 10, 1997. Thus, the petitioner must show its ability to pay the proffered wage not only from 2005 to 2007, when the record demonstrates that the petitioner began paying the proffered wage, but it must also show its continuing ability to pay the proffered wage from 1997 to 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

On appeal, counsel asserts that the proffered wage should be \$32,849.60 per year based on the hourly rate multiplied by 49 weeks instead of 52 to allow for unpaid holiday and personal time off from work. We reject counsel's assertion. The record does not contain evidence to establish the petitioner's holiday schedule or personal time off policy. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). 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). Further, even if the AAO accepted consideration of 49 weeks of pay rather than 52, the resulting difference would not be sufficient to alter the determination that the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage.

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 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 petitioner claims to have been in business since 1987 and to have 4 employees. The tax returns in the record reflect that the petitioner had minimal wages paid to all employees for all relevant years. Although the evidence indicates that the sole proprietor died in 1999, the record does not contain evidence specifically connecting a decline in business to the death of the sole proprietor, or evidence to establish the impact on the petitioner's daily operations. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonogawa*. No evidence was provided to document that 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.

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

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

**ORDER:** The appeal is dismissed.