



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE:

APR 23 2013

OFFICE: TEXAS 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion to reopen and the motion to reconsider will be granted, however, the prior decision of the AAO dated November 22, 2011 will be affirmed. The petition remains denied.

The petitioner operates a physical therapy business. It seeks to employ the beneficiary permanently in the United States as a corrective therapist. 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 (the 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, July 7, 2003. The director denied the petition accordingly. The petitioner filed an appeal on July 21, 2008 which the AAO dismissed on November 22, 2011, and this motion to reconsider followed.

The record shows that the motion to reconsider is properly filed. 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.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel first disputes the AAO's basis for the summary dismissal. The basis of the dismissal was counsel's failure to file his brief and additional evidence. According to the record of proceeding, counsel filed Form I-290B, Notice of Appeal or Motion, on July 21, 2008. With the appeal, counsel submitted a G-28 and a copy of the Texas Service Center decision, dated June 18, 2008. No other documents were included in the filing. On Form I-290B, counsel checked the box to indicate that counsel's brief and/or additional evidence would be submitted to the AAO within 30 days. On Form I-290B, Part 3, Basis for the Appeal, counsel stated, "[p]etitioner respectfully disagrees with the Service's determination regarding Petitioner's ability to pay the wage offered. Petitioner will submit his brief and additional evidence to establish his sufficient financial standing to the AAO within 30 days." The record of proceeding at that time did not contain an appeal brief, or additional evidence submitted in connection with the appeal and contained no evidence that counsel filed a brief or additional evidence along with the filing of the Form I-290B or subsequent to this motion.

However, in the brief accompanying the motion to reopen, counsel states that, "[p]etitioner also submitted a brief in support of that [ability to pay] argument. See **Exhibit A**. The brief pointed to the Petitioner's corporate checking accounts as acceptable financial records to prove ability to pay the offered wage." Counsel further states that along with the appeal brief, the "petitioner submitted copies of its 2007 income tax return and corporate bank account statements for each month between

July, 2003 and July 2008. See **Exhibit C.**” Finally, counsel states that “[p]etitioner’s brief argues that those funds could be used to cover the wage. See **Exhibit A.**”

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel has submitted no evidence to support his assertion that he filed a brief accompanying the appeal. In fact, counsel indicated on the Form I-290B that no brief accompanied the appeal due to the fact that he stated that he would submit his brief and additional evidence to the AAO within 30 days of filing Form I-290B.

Further, counsel has submitted no evidence to support his assertion that a brief in support was filed at any time – either accompanying the Form I-290B or separately, within 30 days. Counsel does not provide any detail on the date and manner of mailing. In support of the motion to reopen and reconsider, there is no declaration by counsel that he mailed the appeal brief. There is no proof of mailing. There is no signed and dated copy of the appeal brief he states that he previously filed. Further, the brief that counsel references as “Exhibit A,” proof that he had previously submitted a brief in support of the appeal, is an undated, two page brief. Additionally, there is no counsel name, law firm or counsel signature on the brief. By contrast, counsel’s brief that accompanied this motion is signed, dated, and appears on counsel’s letterhead.

The record does not support counsel’s assertion that he submitted an appeal brief and additional evidence on appeal. The record contains no evidence to support these assertions. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The declarations that have been provided on motion are not affidavits as they were not sworn to by the declarant before an officer that has confirmed the declarant’s identity and administered an oath. See *Black’s Law Dictionary* 58 (West 1999). Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO finds counsel’s assertion that he timely submitted a brief and additional evidence on appeal is not supported by the record, as he provided no objective evidence to support this assertion. However, even if the documents now in the record had been timely submitted, the evidence provided now on motion does not overcome the director’s grounds for dismissal.

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 in the instant case provides reason to preclude consideration of certain documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec.

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<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).

764 (BIA 1988). The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that “[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” Based on the plain meaning of “new,” a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup>

Thus, the AAO need not consider any evidence submitted with the motion to reopen that was available, but not submitted, at the time the appeal was filed on July 21, 2008. The AAO properly considers evidence submitted with a motion to reopen that was not available at the time the appeal was filed. With the motion to reopen, counsel submitted the following evidence: (1) corporate bank account statements and reconciliation detail for the petitioner from July 2003 to July 2008; and (2) the petitioner’s tax returns for 2007, 2008, and 2009.

In this matter, the petitioner presented the following evidence on motion that may be considered “new” under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen: the petitioner’s 2008 and 2009 tax returns and bank account statements and reconciliation detail for the period ending May 31, 2008 and for the period ending June 30, 2008.

All remaining evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. The 2007 tax returns contains a prepared date of January 26, 2008. There is no evidence in the record that the petitioner filed for an extension of the filing of the 2007 tax return and there is no evidence in the record that the 2007 tax return was filed after the filing date of the appeal. Thus, the 2007 tax return was previously available and could have been submitted. Therefore, the petitioner’s 2007 tax returns need not be considered on motion. As will be explained in detail below, even if the AAO considered the petitioner’s 2007 tax return, the return would not demonstrate the petitioner’s ability to pay the proffered wage in 2007.

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

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<sup>2</sup> The word “new” is defined as “1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . .” *Webster's II New Riverside University Dictionary* 792 (1984) (emphasis in original).

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). 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 July 7, 2003. The proffered wage as stated on the Form ETA 750 is \$40,400 per year. The Form ETA 750 states that the position requires eight years of grade school, four years of high school and a two year associate degree or equivalent in the major field of study of physical therapy and two years of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 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 750B, signed by the beneficiary on October 6, 2005, 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 has not established that it employed and paid the beneficiary the full proffered wage, or any wage, during any relevant timeframe including the period from the priority date in or subsequently.

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 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* 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).

With the motion to reopen, the petitioner submitted its 2007, 2008 and 2009 federal income tax returns. The petitioner's tax returns demonstrate its net income, as shown in the table below.

- In 2003, the Form 1120S<sup>4</sup> stated net income of \$27,030.
- In 2004, the Form 1120S stated net income of \$7,693.
- In 2005, the Form 1120S stated net income of \$2,657.
- In 2006, the Form 1120S stated net income of \$2,349.
- In 2007, the Form 1120S stated net income of \$5,724.
- In 2008, the Form 1120S stated net income of \$79,148.
- In 2009, the Form 1120S stated net income of \$70,632.

Therefore, for the years 2008 and 2009, the petitioner appears to have had sufficient net income to pay the proffered wage. For the years 2003, 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2003, the Form 1120S stated net current assets of -\$3,552.
- In 2004, the Form 1120S stated net current assets of -\$6,556.
- In 2005, the Form 1120S stated net current assets of -\$14,382.

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<sup>4</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 5, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income deductions and other adjustments shown on its Schedule K for 2004, 2006, 2007, 2008 and 2009 the petitioner's net income is found on Schedule K of its tax returns for those years.

<sup>5</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.

- In 2006, the Form 1120S stated net current assets of -\$6,351.
- In 2007, the Form 1120S stated net current assets of -\$6,874.
- In 2008, the Form 1120S stated net current assets of \$257.
- In 2009, the Form 1120S stated net current assets of \$4.

Therefore, for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009, the petitioner did not have sufficient net current assets to pay the proffered wage.

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

On appeal, counsel asserts that the petitioner's net income and assets are sufficient to pay the proffered wage in 2003 because the petitioner would only have to pay the proffered wage for about one-half of the year – from the priority date of July 7, 2003. In essence, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The petitioner states in its motion that the AAO failed to consider the petitioner's assets in determining the petitioner's ability to pay the proffered wage, including automobile purchases, funds in bank accounts and repayment of shareholder loans. Counsel's reliance on the balances in the petitioner's bank account is misplaced. 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. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Finally, 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 above in determining the petitioner's net current assets.

Second, as previously discussed, USCIS considers net income 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 the petitioner's depreciation deduction is misplaced. In the instant case, the cost of the automobiles the petitioner purchased is reflected on Form 1120S, Line 14,

Depreciation and also on Form 4562. Showing that the petitioner's gross income exceeded 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).

On appeal, counsel also asserts that the petitioner's net income combined with assets and bank funds are sufficient to pay the proffered wage from 2004 through 2007 when considering the totality of the circumstances. According to counsel, the petitioner acquired automobiles, as reflected on Form 4562, for its business and deducted \$20,000 yearly from its income for shareholder loans. Counsel states, "[t]hese are voluntary investments made for business purposes that could easily be redirect to investment in human resources."

Finally, counsel identifies annual deductions from income in the amount of \$20,000 for shareholder loans as "voluntary investments made for business purposes" that could have been used to pay the proffered wage. The following loans to shareholders are reflected on Schedule L, line 7, of the petitioner's tax returns:

- 2003 IRS Form 1120S, reflects a loan to shareholders in the amount of \$963.
- 2004 IRS Form 1120S reflects a loan to shareholders in the amount of \$5,687.
- 2005 IRS Form 1120S reflects a loan to shareholders in the amount of \$8,285.
- 2006 IRS Form 1120S reflects a loan to shareholders in the amount of \$10,220.
- 2007 IRS Form 1120S reflects a loan to shareholders in the amount of \$20,021.
- 2008 IRS Form 1120S reflects a loan to shareholders in the amount of \$20,455.
- 2009 IRS Form 1120S reflects a loan to shareholders in the amount of \$20,455.

The petitioner failed to submit evidence to show that these deductions for shareholder loans are discretionary payments or that the petitioner is not otherwise obligated to repay them. Similarly, the petitioner did not show that the assets purchased were "voluntary" or otherwise could be properly considered in determining the petitioner's ability to pay the proffered wage. Without such evidence, the AAO does not find counsel's claim persuasive. 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).

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.

Counsel also asserts that the petitioner has been a competitive business since 2001 and shows historical and significant growth. Counsel notes that the petitioner's expenses and investments, and

the “exceptional increase” in its net income in 2008 and 2009 should be considered in the totality of the petitioners circumstances.

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.

The petitioner did not submit information on (1) the company’s reputation or historical growth since its inception in 2001, (2) the corporation’s milestone achievements or, (3) the company’s accomplishments. In the motion to reopen, the petitioner did not submit information addressing any of these factors. Although net income increased in 2008 and 2009, it decreased from 2003 to 2006. Additionally, the tax returns submitted with the motion show that the petitioner’s gross receipts decreased from 2007 to 2009, and that officer compensation decreased each year from 2007 to 2009. The petitioner indicated on Form I-140 that it employs four workers. Considering this number of employees, the costs of labor as reported on the tax returns were not substantial. 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 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 motion to reopen and reconsider the previous decision of the AAO is granted. The previous decision of the AAO, dated November 22, 2011, will not be disturbed. The petition remains denied.