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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 3 1 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 preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner owns and operates a furniture restoration company. It seeks to employ the beneficiary permanently in the United States as a furniture restorer. 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, 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 November 1, 2010 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 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, 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 28, 2001. The proffered wage, as stated on the Form ETA 750, is $15 per hour for a 40-hour work week (or $31,200 per year). The Form ETA 750 states that the position requires two years of full-time experience in the offered position.

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.[1]

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 October 1990 and to employ seven workers. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked full-time for the petitioner since October 1996. On the beneficiary's Form G-325A, Biographic Information, which the beneficiary submitted to United States Citizenship and Immigration Services (USCIS) in 2007 with his application for adjustment of status, the beneficiary claimed that he stopped working for the petitioner in January 2006.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted Internal Revenue Service Forms W-2 showing that it paid the beneficiary: $53,819.77 in 2001; $51,466.50 in 2002; $48,609 in 2003; $46,278 in 2004; $44,134.70 in 2005; $1,382.20 in 2006; and $7,911 in 2008.[2] The W-2 forms thus establish that the

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[1] 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).

[2] The AAO notes that the beneficiary's Forms W-2 in the record indicate a Social Security Number (SSN) that, according to the Social Security Administration, was issued to an individual other than

petitioner had the ability to pay the offered wage in 2001, 2002, 2003, 2004 and 2005 because it paid the beneficiary more than the annual offered wage in each of those years. The petitioner's payments to the beneficiary in 2006 and 2008, however, do not establish its ability to pay the offered wage because the W-2 forms show that the petitioner paid the beneficiary less than the annual offered wage in each of those years. If the petitioner can demonstrate that its net income or net current asset amounts for 2006 and 2008 meet or exceed the difference between the annual offered wage and the amounts it paid to the beneficiary in those years, however, the petitioner can establish its ability to pay the offered wage for those years.[3]

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the beneficiary. The AAO must underscore that the misuse of another's SSN may lead to fines and/or imprisonment. This office acknowledges that there is no evidence in the record that, for example, the beneficiary knowingly and willfully attempted to deceive the Commissioner of Social Security as to his true identity or knowingly used the means of identification of another person; or that the petitioner knowingly employed an individual who was not authorized to work. The AAO also makes no finding regarding other elements of the crimes described below. However, this office does note that the following provisions of law deal directly with SSN fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

[3] Counsel argues that the petitioner should not have to demonstrate its ability to pay the offered wage in 2007 because the director did not specifically state in his decision that the petitioner failed to

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during relevant years, 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.
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> We find that the AAO has a rational explanation for its policy of not adding

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demonstrate its ability to pay in 2007. The AAO, however, determines that the director's decision infers that the petitioner failed to demonstrate its ability to pay in 2007, that 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate a "continuing" ability to pay the offered wage, and that, in exercising *de novo* review, the AAO specifically finds that the petitioner must demonstrate its ability to pay the offered wage in 2007.

> 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 director closed on August 28, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner did not submit any of its federal tax returns to USCIS. Nor did it submit copies of annual reports or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2). Therefore, for the years 2006, 2007 and 2008, the petitioner did not establish that it had sufficient net income to pay 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.[4] 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. Because the petitioner did not submit its tax returns, annual reports, or audited financial statements, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage in 2006, 2007 and 2008.

Therefore, since the date the DOL accepted Form ETA 750 in 2001, the petitioner has not established that it has had the continuing ability to pay the beneficiary the proffered wage based on examinations of its wages paid to the beneficiary, its net income and its net current assets.

On appeal, counsel asserts that USCIS abused its discretion in determining that the petitioner did not establish its ability to pay the offered wage. Counsel argues that USCIS failed to consider a letter from a certified public accountant regarding the petitioner's gross sales in its 2006 fiscal year and copies of the petitioner's unaudited financial statements from fiscal years 2000 through 2003 and from 2006 through 2007.

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[4]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The accountant's letter stated that the petitioner's "Tax Returns for the fiscal year ended September 30, 2006 reflected Gross Sales of $7,564,391." Counsel argues that the director failed to address how the accountant's letter affected his decision and notes that the 2006 gross sales figure in the accountant's letter matches the same figure in the unaudited financial statements. Counsel asserts that the petitioner's 2006 gross sales amount "is relevant as it shows that the petitioner is solvent and capable of paying the proffered wage."

First, the director was not required to consider the accountant's letter because the petitioner failed to provide the required initial financial evidence of annual reports, federal tax returns or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2)(allowing consideration of "additional" financial information after initial financial evidence is submitted).

Second, the AAO finds the accountant's letter of little value in demonstrating the petitioner's ability to pay the offered wage. As discussed above, relying on the petitioner's gross sales amount would overstate the petitioner's ability to pay the offered wage. The gross sales figure ignores business expenses that the petitioner must pay, such as supplies, equipment, leases to property, and employee wages. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084; *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881.

Further, the AAO disagrees with counsel's assertion that the petitioner's fiscal 2006 gross sales amount shows that the petitioner is solvent and capable of paying the proffered wage. According to the Merriam-Webster dictionary, solvent means "able to pay all legal debts." *See* http://www.merriam-webster.com/dictionary/solvent. (accessed on December 31, 2012). The amount of the petitioner's gross sales is of relatively little value in determining its solvency without information regarding the petitioner's debts for the corresponding time period. Because the gross sales figure does not indicate how much of its gross sales the petitioner must use to pay expenses and debts, the gross sales amount says little about the petitioner's ability to pay the offered wage. As indicated above, federal courts have upheld USCIS's use of net income, rather than gross income, amounts in determining petitioners' abilities to pay the offered wage. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084; *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881.

Counsel's reliance on unaudited financial records is also misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner relying on financial statements to demonstrate its ability to pay the proffered wage to submit *audited* financial statements. As the "Accountant Review Reports" that accompany the petitioner's unaudited financial statements state:

> All information in these financial statements is the representation of the management of
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> A review consists principally of inquiries of corporation personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we express no such opinion.

Without an accountant's opinion to provide reasonable assurance that the financial statements give a true and fair view of the company's finances in accordance with the financial reporting framework, the information in the statements is only the representation of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972) (Going on record without reliable, supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

The accountant states that the fiscal 2006 gross sales figure in the unaudited financial statements matches the same figure in the petitioner's tax returns and makes the 2006 gross sales figure more reliable. But the AAO cannot find that the reliability of one figure in the 2006 financial statements confirms the reliability of all the figures in the 2006 financial statements, let alone the reliability of the 2007 financial statements. If the information in the petitioner's unaudited financial statements matches the information in its federal tax returns, the petitioner should have submitted copies of its relevant federal tax returns as the regulation at 8 C.F.R. § 204.5(g)(2) requires.

In addition, the petitioner's unexplained omission of its federal tax returns and the accountant's confirmation of only one of the petitioner's financial figures in its unaudited financial statements raise questions about whether the petitioner chose not to submit additional financial documentation to hide inconsistent and/or unfavorable information. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988)("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").

For the foregoing reasons, the AAO finds that the accountant's letter and the unaudited financial statements do not demonstrate the petitioner's continuing ability to pay the offered wage.

Counsel also asserts that USCIS abused its discretion by not completely and fairly considering the petitioner's evidence. Counsel argues that USCIS unfairly determined that the petitioner's submission of an August 2008 paycheck to the beneficiary failed to demonstrate the petitioner's ability to pay because the check showed that the petitioner had paid the beneficiary only $3,548.50 so far that year. "The purpose of this form of evidence was to show that the petitioner was still in existence and that the petitioner was at that time paying the beneficiary $18.00 per hour, an amount over the proffered wage of $15.00 per hour," counsel argues.

The AAO finds that the petitioner's submission of the beneficiary's August 2008 paycheck establishes that the petitioner was in existence. But the petitioner must demonstrate that it had the financial ability to pay the beneficiary's offered wage throughout the entire year of 2008. *See* 8 C.F.R. § 204.5(g)(2). The submission of only one of the beneficiary's 2008 paychecks, even at an hourly wage of $3 above the offered wage, is insufficient to show the beneficiary's ability to pay the offered wage over the entire year. By noting that the check indicated that the petitioner had only paid the beneficiary $3,548.50 as of August, the director appropriately inferred that the petitioner was not likely to pay the beneficiary the entire annual offered wage of $31,200 by the end of the

year. Indeed, with its appeal, the petitioner submits a copy of the beneficiary's 2008 W-2 form, showing that the petitioner paid the beneficiary a total of only $7,911 in 2008. The AAO therefore finds that USCIS did not abuse its discretion.

Also with its appeal, the petitioner submits copies of monthly bank account statements from December 2005 to February 2008, showing month-end balances ranging from a low of $8,798.51 in March 2006 to a high of $130,014.88 in December 1995. Because all of the month-end balances exceed the monthly offered wage of $2,600, counsel argues that the bank account statements demonstrate the petitioner's ability to pay the offered wage in 2006, 2007 and 2008.

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, as listed in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. As discussed previously, 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 amounts in accounts on given dates, and cannot show the sustainable ability to pay a proffered wage. The petitioner submitted copies of eight monthly bank statements from 2006, four from 2007, and one from 2008.[5] While all of the statements show month-end balances above the $2,600 monthly offered wage, the petitioner has not submitted enough statements to demonstrate its ability to pay the offered wage throughout the entire years of 2006, 2007 and 2008.

Counsel also asserts that the petitioner would have used the wages it paid to part-time employees in the offered position to pay the offered wage of the beneficiary. The petitioner would not have needed the part-time employees had the beneficiary worked full-time for it, according to counsel. With its appeal, the petitioner submitted a copy of a Form W-2 of a purported part-time employee, showing that the petitioner paid the employee $23,230.35 in 2008.

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. But, where a petitioner submits evidence of the names and wages of employees, verifies that their duties are those of the proffered position, and provides evidence that the petitioner has replaced or will replace them with the beneficiary, the petitioner may show that the wages already paid to those employees are available to pay the wage proffered to the beneficiary.

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[5] Counsel claims that the petitioner submitted 10 monthly bank statements from 2006, five from 2007, and two from 2008. But the AAO is only able to find eight statements from 2006, four from 2007, and one from 2008. The AAO cannot accept counsel's assertions of the additional monthly balances as evidence without corroboration of the monthly balances. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (The assertions of counsel do not constitute evidence).

Here, counsel argues that the beneficiary will replace multiple part-time employees, but the petitioner provides a W-2 form of only one employee to be replaced. The $23,230.35 that the petitioner paid the part-time employee in 2008 does not equal or exceed the annual offered wage rate. Even adding in the $7,911 that the petitioner paid the beneficiary in 2008, the petitioner has shown that only $31,141.35 – less than the annual offered wage of $31,200 - was available to pay the beneficiary in 2008. The petitioner does not state the names and wages of any other employees to be replaced, nor does it provide evidence of wages paid to the one identified worker in 2006 or 2007. Moreover, the petitioner has not submitted evidence to confirm counsel's assertions that the position of the identified worker involves the same duties as those set forth in the approved Form ETA 750 or that the petitioner has or intends to replace the part-time workers with the beneficiary. *See Matter of Obaigbena*, 19 I&N at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel do not constitute evidence).

The petitioner also does not explain why it employed part-time workers in the offered position. The Form ETA 750 indicates that the beneficiary began working full-time for the petitioner in the offered position in 1996. W-2 forms that the petitioner submitted show that it paid the beneficiary more than the offered wage from 2001 through 2005. The beneficiary's Form G-325A and his later W-2s show that the beneficiary stopped working, at least on a full-time basis, for the petitioner in 2006. The petitioner's employment of part-time workers in the offered position after employing the beneficiary full-time in the position suggests that the petitioner no longer intends to and/or is unable to employ the beneficiary on a full-time basis. *See Matter of Ho*, 19 I&N at 591-592 (petitioner must resolve inconsistencies by independent, objective evidence). For the foregoing reasons, the AAO finds that the petitioner has not demonstrated that the wages of part-time employees to be replaced in the offered position were available to pay the beneficiary's offered wage.

Finally, counsel asserts that USCIS must consider the overall magnitude of the petitioner's business activities in considering its ability to pay the offered wage. Counsels argues that the petitioner's many years in operation, the nature of its specialty retail furniture business, and the amounts of its annual gross sales demonstrate its ability to pay the offered wage.

As previously indicated, the AAO agrees that USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa, supra.* The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may 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's number of years in business weighs in its favor. But, as discussed previously, the AAO does not find the petitioner's annual gross sales figures to be reliable because they are contained in unaudited financial statements.[6] Moreover, the gross sales figures show that the petitioner's annual gross sales have been declining since 2002. Also discussed previously, the petitioner failed to demonstrate that the wages of part-time employees to be replaced were available to pay the beneficiary's offered wage. In addition, unlike the petitioner in *Sonegawa*, the petitioner has not identified any uncharacteristic business expenses or losses that explain its failure to otherwise demonstrate its ability to pay the beneficiary. And, despite the assertion of counsel regarding the high quality of the petitioner's specialty retail furniture, the petitioner has not submitted evidence of an outstanding reputation in its industry. Therefore, considering the totality of the circumstances in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated a continuing ability to pay the beneficiary's offered 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.

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[6] Counsel argues that USCIS should consider the unaudited financial statements and the accountant's letter in its *Sonegawa* analysis because the letter and financial statements are "outside the petitioner's net income and net current assets." While *Sonegawa* allows USCIS to go beyond a petitioner's net income and net current assets when considering the ability to pay the offered wage, *Sonegawa* does not allow USCIS to consider unreliable evidence. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (USCIS must determine whether facts in a petition are true). As discussed previously, the AAO has found the petitioner's unaudited financial statements to be unreliable, even though the accountant stated that the 2006 gross sales figure in the statements matches the same figure on the petitioner's 2006 tax return. Based on the accountant's letter, the AAO found the 2006 gross sales figure to be more reliable than the other information in the financial statements. But the accountant's letter confirms only one gross sales figure since the 2001 priority date. The letter is insufficient to demonstrate the petitioner's consistent growth in gross sales as a favorable factor in a *Sonegawa* analysis.