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

[redacted]

Date: JUN 17 2013 Office: TEXAS SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF REPRESENTED

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: On June 11, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on March 13, 2003. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on June 8, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The approval of the petition will remain revoked.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a baker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).[1] As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on March 13, 2003 by the VSC, but that approval was revoked in June 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures in connection with the approved labor certification application, that the petitioner failed to demonstrate that the beneficiary had the experience required by the terms of the labor certification, that the petitioner did not intend to employ the beneficiary, and that the documents submitted in response to the director's Notice of Intent to Revoke (NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, former counsel for the petitioner[2] contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have specific evidence

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[1] Section 203(b)(3)(A)(i) of 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.

[2] , an associate with filed a brief with the appeal. then left for a different firm. The AAO contacted the petitioner and via facsimile to determine who would be representing the petitioner on appeal. No response was received from either party, so the petitioner will be considered to be self represented. The counsel who filed the initial submissions and represented the petitioner during the revocation before the director, will be referred to by name. The AAO notes that was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals

for this case to demonstrate that the approval of the petition should be revoked under section 205 of the Act; 8 U.S.C. § 1155. Counsel argues that the director erred in finding that the petitioner did not comply with the DOL recruitment requirements, that the beneficiary was not qualified for the position, and that the petitioner needed to offer the beneficiary a position when the beneficiary had already ported to a new employer.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.[3]

Although not raised by counsel, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

[3] 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).

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987), provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR dated February 18, 2009, the director wrote:

> The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files.

The director advised the petitioner in the NOIR that the instant case might involve fraud. The director specifically asked the petitioner to submit additional evidence to demonstrate that it had complied with all of the DOL recruiting requirements. The director also asked the petitioner to submit an original letter reaffirming its intent to employ the beneficiary in the proffered job and evidence that the beneficiary met the minimum experience requirements. Furthermore, the NOIR noted that the CNPJ number[4] provided on the letter submitted to verify the beneficiary's past employment indicated that the business was not established until three years after the beneficiary claimed to have worked at the location and that the petitioner did not submit evidence of its ability to pay the proffered wage from the April 30, 2001 priority date onwards.

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[4] Businesses that are officially registered with the Brazilian government are given a unique CNPJ Cadastro Nacional de Pessoa Juridica (CNPJ) number. The CNPJ is similar to the federal tax identification number or employer identification number in the United States. The U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian company's registered creation date.

As noted above, section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. at 590.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR, and that the director's NOIR gave the petitioner notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications and the petitioner's need to demonstrate the ability to pay the proffered wage. The AAO finds that the director's NOIR would warrant a revocation of the approval of the petition if unexplained and unrebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIR. *See, Matter of Arias*, 19 I&N Dec. at 568; *Matter of Estime*, 19 I&N Dec. at 450.

In response to the director's NOIR, the petitioner submitted the beneficiary's Internal Revenue Service (IRS) Forms W-2 for 2001 through 2006 evidencing wages paid by the petitioner, a statement of the beneficiary concerning her past work experience, a letter from the beneficiary's new employer confirming employment, a new letter from her employer in Brazil to verify previous experience, newspaper advertisements for the position, and an article about the informal Brazilian economy. The director in the Notice of Revocation (NOR) dated June 8, 2009, acknowledged the receipt of this evidence, but held that the evidence in the record did not establish that the beneficiary had the experience claimed, that the petitioner had the ability to pay the proffered wage from the priority date onwards, or that the petitioner conducted recruiting in accordance with DOL requirements.

On April 2, 2013, the AAO sent a Request for Evidence and Notice of Derogatory Information (RFE/NODI) to the petitioner raising concerns regarding whether the appeal was filed by the petitioner, and noting that the petitioner had failed to establish the continuing ability to pay the proffered wage from the priority date onwards, and that the beneficiary possessed the minimum requirements of the position as of the priority date. The AAO indicated that the Form G-28, Notice of Entry of Appearance as Attorney or Representative, that accompanied the Form I-290B Appeal lists as the person consenting to the representation and authorizing the appeal to be filed. The NOID/NODI further noted that the Massachusetts Secretary of the Commonwealth website indicated that the petitioner's registered agent changed in 2007 and the officers and directors changed in 2008, indicating that was not an authorized representative of the petitioner when the appeal was filed in 2009. A letter submitted by counsel dated July 24, 2009 indicates that was the "former owner" of the petitioner. The petitioner was advised that the regulation at 8 C.F.R. § 103.1(a)(1)(iii)(B) provides that an appeal may be pursued only by a person or entity with legal standing and "it does not include the beneficiary of a visa petition." *See also* 8 C.F.R. § 103.3(a)(2)(v)(A)(1). The RFE/NOID thus requested evidence to establish that had the authority to file the appeal.

The petitioner failed to respond to the AAO's NOID/NODI or to provide any additional evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds

for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The evidence in the record does not indicate that was an authorized representative of the petitioner and thus the appeal shall be rejected pursuant to 8 C.F.R. § 103.1(a)(1)(iii)(B).

Another issue raised on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL. The director indicated that the petitioner did not conduct good faith recruitment and found that the petitioner had engaged in fraud or material misrepresentation with respect to the recruitment process. The AAO disagrees. The record does not show inconsistencies or anomalies in the recruitment process that would justify the issuance of a NOIR based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "baker." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "will prepare and bake a variety of breakfast and pastry items." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary, she represented that she worked 40 hours a week at in Brazil as a baker from October 1994 to April 1997. The petitioner initially submitted a letter dated March 15, 2001 bearing an illegible signature stating that the beneficiary worked at that establishment from October 1, 1994 through April 30, 1997. The letter did not contain the name of the employer nor a description of job duties as required by 8 C.F.R. § 204.5(l)(3)(iii)(A). In response to the NOIR, the petitioner submitted a letter dated February 25, 2009, signed by reiterating the beneficiary's dates of employment. This letter also failed to include a description of the job duties as required by 8 C.F.R. § 204.5(l)(3)(iii)(A) nor was the identity of the author stated to be assured that the signator was the actual employer of the beneficiary in this position. The petitioner also submitted a signed statement from the beneficiary avowing that she worked for for the dates indicated. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. *See Matter of Ho*, 19 I&N Dec. at 591-592. As noted in the NOIR, doubts were raised about the beneficiary's previous employment and independent, objective evidence was requested to resolve the doubts. *Id.*

On appeal, counsel states that the beneficiary has submitted more than sufficient evidence to demonstrate that she has the requisite two years of experience for the proffered position. The AAO

disagrees. The petitioner did not submit any additional evidence to rebut and resolve the noted inconsistencies in the record. *Id.* As a result, the petitioner has not demonstrated that the beneficiary possessed the two years of experience required by the terms of the labor certification as of the priority date and the revocation of the petition may not be rescinded.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

> *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.

In the instant case, the ETA 750 labor certification was accepted for processing on April 30, 2001. The rate of pay or the proffered wage specified on the ETA 750 is $12.61 per hour or $26,228.82 per year. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the following IRS Forms W-2:

- The 2001 IRS Form W-2 states that the petitioner paid the beneficiary $15,980.26.
- The 2002 IRS Form W-2 states that the petitioner paid the beneficiary $16,490.70.
- The 2003 IRS Form W-2 states that the petitioner paid the beneficiary $17,300.08.
- The 2004 IRS Form W-2 states that the petitioner paid the beneficiary $21,104.83.
- The 2005 IRS Form W-2 states that the petitioner paid the beneficiary $12,162.74
- The 2006 IRS Form W-2 states that the petitioner paid the beneficiary $18,129.07.

As the wages paid in each year are less than the proffered wage, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage, which in 2001 was $10,248.56; in 2002, was $9,738.12; in 2003, was $8,928.74; in 2004, was $5,123.99; in 2005, was $14,066.08; and in 2006, was $8,099.75.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

The petitioner submitted only its 2001 IRS Form 1120S which stated a net income[5] of -$110,537, which is insufficient net income to pay the difference between the actual wage paid and 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.[6] 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 2001 IRS Form 1120S stated net current assets of -$88,706, which were insufficient to pay the difference between the actual wage paid and 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 as the beneficiary ported to other employment, the petitioner no longer needs to establish the ability to pay the proffered wage. The American Competitiveness in the Twenty-First Century Act of 2000 (AC21) allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that

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[5] 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 23 (1997-2003) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed May 15, 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 adjustments shown on its Schedule K for 2001, the petitioner's net income is found on Schedule K of its tax return for that year.

[6] 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 petition must be valid prior to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). As a result, the petitioner must submit evidence to demonstrate its ability to pay the proffered wage from the priority date to the date that the beneficiary ported. No such evidence has been submitted here.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's 2001 Form 1120S, the only financial document submitted for its organization, stated negative net income and negative net current assets. In addition, the Forms W-2 submitted do not state that the petitioner paid at or above the prevailing wage for any of the six years submitted. The petitioner did not submit any evidence of its reputation or standing in the community, nor did it submit evidence to explain why one year's financial position would be anomalous pursuant to *Sonegawa.* 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 petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The appeal is dismissed and the approval of the petition remains revoked.