



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: JUN 25 2013

OFFICE: TEXAS SERVICE CENTER

[Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

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

ON BEHALF OF PETITIONER:

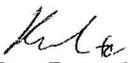
[Redacted]

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

The petitioner is a computer software company. It seeks to employ the beneficiary permanently in the United States as a Computer Support Specialist. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and 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 August 21, 2012 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on March 18, 2009. The proffered wage as stated on the ETA Form 9089 is \$23.76 per hour (\$49,420.80 per year based on 40 hours per week). The ETA

Form 9089 states that the position requires a bachelor's degree in computer science in information technology or in the alternate field of information technology, and 48 months experience in the job offered or in the alternate occupations of computer systems analyst, management consultant, or crystal report consul.

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 record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in 2006 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on November 3, 2011, the beneficiary claimed to have worked for the petitioner since December 13, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 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

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 A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

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. The beneficiary's Forms W-2 demonstrate the wages paid for 2010 and 2011 as shown in the table below.

- In 2010, the Form W-2 showed wages paid to the beneficiary of \$41,606.60.
- In 2011, the Form W-2 showed wages paid to the beneficiary of \$48,466.80.

The petitioner also submitted Employee Earnings Records for 2009, 2010, and 2011. The Employee Earnings Record shows wages paid to the beneficiary in the amount of \$41,601.60 in 2009. For 2010 and 2011, the Employee Earnings Records show wages paid to the beneficiary of \$41,606.60 and \$48,466.80, respectively.

The AAO notes that the petitioner did not submit a Form W-2 issued to the beneficiary for 2009. Additionally, on the labor certification, which was signed by the beneficiary under penalty of perjury on November 3, 2009, the beneficiary claims to have worked for the petitioner from December 13, 2006 until March 18, 2011. The earnings statement also shows the beneficiary's date of hire as May 15, 2008, and not December 13, 2006, as stated on the labor certification. The record contains inconsistencies regarding the petitioner's employment of the beneficiary. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592. This issue must be resolved with any further filings.

In 2009, 2010 and 2011, the petitioner paid the beneficiary less than the proffered wage of \$49,420.80. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage for the years 2009, 2010, and 2011. The following table shows the difference between wages actually paid to the beneficiary and the proffered wages for the relevant years.

- 2009: \$7,814.20
- 2010: \$7,814.20
- 2011: \$954.00

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 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).

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

The record before the director closed on July 6, 2012 with the receipt by the director of the petitioner’s submissions in response to the director’s Notice of Intent to Deny (NOID). As of that date, the petitioner’s 2011 federal income tax return was the most recent return available. The AAO notes that, although specifically requested by the director in the NOID, the petitioner did not submit its 2009 federal income tax returns, audited financial statements, annual reports, or other regulatory prescribed evidence of its ability to pay the proffered wage. Therefore, the AAO cannot determine

the petitioner's ability to pay the proffered wage for 2009. The petitioner was provided 30 days (twelve weeks) to provide a response to the director's NOID. Three additional days were provided because the request for evidence was sent to the petitioner by mail.

The regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The regulations are clear that failure to respond to a request for evidence *shall* result in the application or petition being considered abandoned and denied. Thus, the director should have denied the petition as abandoned for failure to provide all of the requested evidence. Denials for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15). Nevertheless, as the director's decision was based on the merits of the evidence, we will similarly adjudicate the appeal.

The petitioner's tax returns stated its net income as detailed in the table below.

- In 2010, the petitioner's Form 1065 stated net income of \$4,665.³
- In 2011, the petitioner's Form 1065 stated net income of -\$51,909.

Therefore, for the years 2009, 2010, and 2011, the petitioner did not establish that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A partnership's year-end

³ For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 5 (2008-2010) and page 4 (2011) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed June 19, 2013) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K does not have relevant entries for additional income, credits, deductions, or other adjustments, and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

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

current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net 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 stated its net current assets as detailed in the table below.

- In 2009, the petitioner's Form 1065 stated net current assets of -\$38,130.⁵
- In 2010, the petitioner's Form 1065 stated net income of \$42,172.
- In 2011, the petitioner's Form 1065 stated net income of -\$16,203.

The petitioner's net current assets in 2010 were greater than the difference between the wages actually paid to the beneficiary and the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage in 2010. However, for the years 2009 and 2011, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the ETA Form 9089 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 remunerated the beneficiary in excess of the proffered wage in 2011 through payment of healthcare premiums in the amount of \$2,965 during that year. An employer may pay the beneficiary's health insurance premiums in one of two ways. The first is known as a cafeteria plan. A "cafeteria plan" is a nontaxable benefit which deducts cafeteria plan payments such as health insurance premiums from gross pay resulting in the figure which appears on the Form W-2. See I.R.C. § 125. Benefits under a "cafeteria plan" will not be added to the wages actually reported to the beneficiary on IRS Form W-2.⁶ "The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." See 20 C.F.R. § 656.10(c)(2).

one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ As shown on Schedule L of the 2010 Form 1065.

⁶ A cafeteria plan is a written plan that allows employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from wages. See <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (accessed June 20, 2013). If an employee chooses to receive a qualified benefit under the plan, the qualified benefit is nontaxable if the benefits are excludable from gross income under a certain section of the Internal Revenue Code.

The other means by which an employee may receive health insurance premiums is in the form of a fringe benefit. A fringe benefit is a form of pay for the performance of services. A fringe benefit is taxable to the recipient employee unless the law specifically excludes it. <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (accessed June 20, 2013).⁷ The beneficiary's IRS Forms W-2 for 2010 and 2011, as well as the petitioner's earnings statements, do not show that the beneficiary's health insurance premiums were deducted from gross pay.⁸ An employee's gross pay minus the nontaxable fringe benefit payments results in the compensation figures which appear on the employee's IRS Form W-2.

In the instant petition, in evaluating the petitioner's ability to pay the proffered wage, the beneficiary's gross pay amounts will be used, as reported on the Forms W-2. In this case, there is nothing to indicate that the beneficiary's gross pay has been reduced by a cafeteria plan or a fringe benefit. The earnings statements submitted by the petitioner show that the beneficiary's gross income was not reduced by payment of health insurance premiums. Additionally, the petitioner did not submit paycheck stubs or other evidence that the beneficiary's gross wages were reduced by the amount paid in health insurance premiums. Additionally, the petitioner submitted a list of checks paid which was generated by the petitioner. While some of the checks listed contain a memo written by the petitioner regarding health insurance premiums paid on behalf of the beneficiary, there is no evidence that the beneficiary's gross wages were reduced by those amounts nor is there any evidence that the health insurance premiums were actually paid. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

Counsel also argues that the petitioner's normal accounting practices must be taken into account when evaluating the petitioner's ability to pay the proffered wage. In support of this contention, counsel cites an unpublished AAO decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound

⁷ For federal tax purposes, an employer reports taxable fringe benefits in box 1 of an employee's IRS Form W-2. Nontaxable fringe benefits are excluded from box 1 of an employee's IRS Form W-2.

⁸ Examples of nontaxable fringe benefits include, but are not limited to, certain accident and health benefits, dependent care assistance (up to certain limits), group-term life insurance coverage, and health savings accounts (up to certain limits). See I.R.C. §§ 105, 129, 106. Employers may also offer cafeteria plans to their employees. See I.R.C. § 125. A cafeteria plan is a written plan that allows employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from wages. See <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (accessed June 20, 2013). If an employee chooses to receive a qualified benefit under the plan, the qualified benefit is nontaxable if the benefits are excludable from gross income under a certain section of the Internal Revenue Code.

volumes or as interim decisions. 8 C.F.R. § 103.9(a). Additionally, the petitioner has not submitted any evidence that the use of the petitioner's tax returns, audited financial statements, or annual reports to establish the ability to pay do not reflect the petitioner's normal accounting practices.

Counsel also contends that the members of the petitioner had assets in excess of the prevailing wage as of the priority date. In support of this contention, the petitioner submits the consolidated financial statements for 2009, 2010 and 2011 of [REDACTED]

[REDACTED] Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel further asserts that the salaries of the petitioner's members are discretionary, and thus, are available to pay the proffered wage. Counsel again cites to an unpublished decision in support of his assertion.⁹ The petitioner submits the Forms W-2 for [REDACTED] which reflect wages paid in 2009, 2010, and 2011 in the amount of \$82,800. The Forms W-2 for Bradley Creger were not submitted. Based on the earnings statement in the record, [REDACTED] was paid \$54,000 in 2011 and in 2012. Counsel asserts that this officer compensation is discretionary and could have been used to pay the proffered wage. The amount of officer compensation paid to [REDACTED] does not vary over the course of the pertinent years. The petitioner failed to submit evidence to show that officer compensation payments were not fixed by contract or otherwise. 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).

The record also contains an unaudited profit and loss statement for 2011. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁹ While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel contends that the totality of the circumstances should be considered in evaluating the petitioner's ability to pay the proffered wage. Counsel cites three unpublished decisions in support of his contention.¹⁰

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

In the instant case, counsel argues that the petitioner's gross receipts increased significantly from 2009 to 2011 as did the number of employees. In support of this contention, the petitioner relies on federal tax returns for 2010 and 2011, as well as earnings statements generated by the petitioner. Counsel claims that the petitioner's gross receipts were \$199,179 in 2009. However, the petitioner has not submitted its tax returns for 2009, therefore, the record does not contain any evidence to verify counsel's contention. 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). Additionally, there is no evidence that the number of employees grew significantly. On the petition, the petitioner indicated that it had seven employees. According to the employee earnings record prepared by the petitioner, the petitioner employed fifteen employees by 2012. The AAO notes that two of the employees are members of the petitioner. The petitioner has not demonstrated that its workforce has increased significantly based on the information in the record.

¹⁰ While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Additionally, the petitioner has not demonstrated that it has paid the beneficiary the proffered wage in any year, nor has it demonstrated sufficient net income or net assets to pay the proffered wage in two of the three relevant years. The petitioner also failed to include any evidence of historical growth of the petitioner's business, the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses, such as those in *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 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.