



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: SEP 06 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: On July 26, 2006, United States Citizenship and Immigration Services (USCIS), Texas Service Center (TSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the TSC director on August 17, 2006. The director, however, revoked the approval of the immigrant petition on August 24, 2012, 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 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 [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] 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 an emergency restoration services company. It seeks to employ the beneficiary permanently in the United States as a dry wall emergency service supervisor 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 ETA Form 9089 labor certification. As stated earlier, this petition was approved on August 17, 2006 by the TSC, but that approval was revoked on August 24, 2012. The director determined that the evidence in the record did not establish that the beneficiary had the experience required by the terms of the labor certification, that information provided on the labor certification appeared to be untrue, and that the job offer was not *bona fide*. In addition, the director noted the previous labor certification filed by the beneficiary's company seeking to sponsor him, i.e. functional self-petition. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

On appeal, counsel for the petitioner contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director made improper insinuations and evidentiary leaps from the documents submitted. Counsel states that rational steps were taken in the beneficiary's employment and that reasonable explanations exist for the discrepancies cited by the director as bases for the decision.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The Administrative Appeals Office (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.²

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 The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

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:

(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 un rebutted, 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.

The director advised the petitioner in his Notice of Intent to Revoke (NOIR) dated July 12, 2012 that the instant case might involve fraud. Specifically, the NOIR noted that the evidence submitted concerning the beneficiary's prior employment was not consistent in all filings. Specifically, the beneficiary's Form G-325, filed with his Form I-485, stated that he began employment with the petitioner in 2005 and worked for [REDACTED] from September 2000 to January 2005. The labor certification states that the beneficiary worked for [REDACTED] from November 17, 1994 to February 25, 1996, February 26, 1996 to February 9, 1997, and September

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).

20, 2000 to January 14, 2005. The NOIR noted that the beneficiary's first confirmable entry to the U.S. was July 22, 1996, the beneficiary did not indicate that he had any employment after January 14, 2005, and there was a gap in the beneficiary's employment history from February 9, 1997 to September 2000. During this same time, the beneficiary incorporated his own company, [REDACTED], which existed from February 1997 to September 2010. The beneficiary served as [REDACTED] from February 1997 to March 2001 and from February 2003 to September 2010. During the period that the beneficiary did not serve as its [REDACTED] filed a Form I-140 petition to sponsor the beneficiary, which was denied. The NOIR noted that the labor certification contained no mention of [REDACTED] even though the job was related to the proffered job and job history, nor did the beneficiary explain how he was employed by both [REDACTED] during the same time.

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 NOIR gave the petitioner notice of the derogatory information specific to the current proceeding. As noted earlier, the AAO finds that the director's NOIR would warrant a revocation of the approval of the petition if unexplained and un rebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIRs. 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 visa history stating entry into the U.S. on July 8, 1994, June 23, 1999, and April 29, 2000.
- A credit report stating the beneficiary's employment with [REDACTED] as a painter in August 1996.
- A letter from [REDACTED] stating that the beneficiary worked as a field painter and drywall repair person from November 1994 to September 1997 and September 2000 to January 2005.
- A statement from the Florida Department of Financial Services concerning workers' compensation coverage requirements for construction industry companies.

The director analyzed the documents submitted and determined that the documents satisfied the inquiry regarding whether the beneficiary was physically present in the United States prior to July 1996, so no discrepancy existed between what was claimed on the labor certification. The director, however, found that the evidence submitted by the petitioner did not establish that the beneficiary had the experience required by the terms of the labor certification as of the priority date. Specifically, the director noted in the Notice of Revocation (NOR) that the evidence submitted did

not establish that the beneficiary was employed by [REDACTED] in the position claimed on the ETA Form 9089 and experience letters. Specifically, the director found that the credit report indicates that the beneficiary was employed as a painter and not a drywall supervisor. The director also noted that although the beneficiary stated that he incorporated [REDACTED] for insurance purposes, he would have still been an employee of that company instead of [REDACTED], so the evidence did not resolve the discrepancy as to the true employer between 2001 through 2005. In addition, due to the discrepancy in employer, the evidence did not establish the number of hours per week, if the beneficiary worked every week for [REDACTED], whether the beneficiary actually did the work or just ran the company, or the nature of the work done. The director specifically stated that the petitioner failed to submit evidence to demonstrate why the beneficiary stepped down from the [REDACTED] while the Form I-140 was pending and that the failure to address an issue is alone grounds for denying the petition.

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 9089 as certified by the DOL and submitted with the petition.

Here, the ETA Form 9089 was filed and accepted for processing by the DOL on February 17, 2006. The name of the job title or the position for which the petitioner seeks to hire the beneficiary is "dry wall emergency service supervisor." Under the job requirements, the labor certification requires a high school education and 60 months of experience in the offered occupation.

On Part J of the labor certification, the beneficiary represented³ that he worked as a drywall supervisor for [REDACTED] from February 26, 1996 to February 9, 1997 and from September 20, 2000 to January 14, 2005; the beneficiary also represented that he worked as a drywall hanger for [REDACTED] from November 17, 1994 to February 25, 1996. The petitioner submitted a letter dated June 19, 2006 from [REDACTED], direct supervisor, stating that the beneficiary worked for [REDACTED] from November 17, 1994 to February 25, 1996 as a drywall hanger at an average of 40 hours per week. In response to the NOIR, the petitioner submitted an August 9, 2012 letter from [REDACTED], [REDACTED], stating that the beneficiary "[REDACTED] has worked for [REDACTED] as a field painter and drywall repair [sic] from Nov. 1994 thru Sep. 1997 and once again from Sep. 2000 thru Jan. 2005." These letters do not state that the beneficiary was working in the proffered position as a drywall emergency service supervisor, but instead state that the beneficiary worked in a non-supervisory capacity, which is a position different than the proffered position. The position stated on the credit report, states that the beneficiary worked as a "painter," which is also not a supervisory position. On the labor certification, the petitioner indicated that no alternate professional experience

³ It is also noted that the beneficiary has not signed the certified ETA Form 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. See 20 C.F.R. § 656.17(a)(1). This issue must be resolved with any further filings.

would be acceptable for the position. As a result, the record is insufficient to demonstrate that the beneficiary has the experience required by the terms of the labor certification as of the priority date.

The AAO sent a Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NDI)⁴ on June 13, 2013 stating that evidence available from the Florida Department of State Division of Corporations, [REDACTED] showed that [REDACTED] was not established until January 29, 1996, which is more than a year after the beneficiary claims to have begun working for the company. In response, the petitioner submitted [REDACTED] articles of incorporation, filed January 29, 1996 and a request to obtain a copy of [REDACTED] occupational license from 1994. This evidence does not establish that [REDACTED] was operational prior to January 29, 1996 to be able to employ the beneficiary. Even if [REDACTED] had an occupational license prior to [REDACTED] incorporation date, there is no evidence that having such a license allows for the operation of a company or the employment of others nor any evidence that [REDACTED] actually employed the beneficiary prior to [REDACTED] incorporation.

The evidence in the record also does not establish that [REDACTED] was the beneficiary's actual employer during the claimed times. As stated above, the beneficiary incorporated a business, [REDACTED] in 1997, and served as president of that company from 1997 to March 2001 and from February 2003 to September 2010. Although the August 9, 2012 letter from [REDACTED] states that the beneficiary was working for [REDACTED] from September 2000 through January 2005, he also states that the beneficiary was "[REDACTED]". As a result, it does not appear that [REDACTED] employed the beneficiary directly. In addition, that letter does not state that the beneficiary was employed in a full-time capacity. On appeal, counsel states that the beneficiary was running his own business, [REDACTED] during this time and was actively involved in the business both when he was serving as president as well as when a co-worker was president. As a result, it is unclear that the beneficiary was employed by [REDACTED] at any time. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (stating that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). In response to the director's NOIR, the petitioner submitted the Florida workers' compensation coverage requirements for construction employers along with a statement by counsel that [REDACTED] was formed to help [REDACTED] avoid this requirement, however, no evidence was submitted to demonstrate that [REDACTED] employed the beneficiary in a full-time capacity during the claimed times. 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 AAO's NOID/NDI also requested evidence to demonstrate that the petitioner would be the beneficiary's actual employer as opposed to hiring the beneficiary as a subcontractor through [REDACTED].⁵ The petitioner submitted evidence that [REDACTED] is no longer an active company,

⁴ The NOID/NDI also noted a discrepancy in the petitioner's address from the Florida Department of State, Division of Corporations website and the petitioner's 2006 annual report. That discrepancy was explained and evidentially supported by the petitioner in response.

⁵ The AAO's NOID/NDI inquired regarding the use of the same address for both the petitioner and [REDACTED] suggesting a financial or personal relationship between the owners and/or their companies. A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the

however, we note that [REDACTED] incorporated in 2009, is an active corporation run by the beneficiary's wife and his partner in [REDACTED]. The company is in the same line of business as [REDACTED] and it is unclear if the petitioner intends to hire the beneficiary as a subcontractor through this new business.⁶ The NOID/NDI specifically requested Internal Revenue Service (IRS) Forms W-2 or 1099s for each year that the beneficiary was employed by the petitioner. The petitioner did not submit the requested Forms. Instead, the petitioner submitted a letter from [REDACTED] stating that the petitioner was not required to send any such Form, because it employed the beneficiary through [REDACTED]. The letter does not address the period of time from February 2010 to 2013, the period of time from when [REDACTED] ceased to be an active corporation until the response to the NOID/NDI was submitted. Although the petitioner states that it will employ the beneficiary directly and cites the closure of [REDACTED] as evidence of its intent, no evidence was submitted to demonstrate that the petitioner actually does employ the beneficiary directly since that time. As a result, the AAO is unable to ascertain the petitioner's intent to employ the beneficiary directly as opposed to as a subcontractor, so the petitioner has not demonstrated that the job offer is *bona fide* and the petition will remain denied on this basis as well.

Beyond the director's NOR, the petitioner must establish its ability to pay the proffered wage from the priority date, as well as that the beneficiary had the requisite work experience in the job offered before the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart* 374, 2000-INA-93 (BALCA May 15, 2000). The letter from [REDACTED] stated that [REDACTED] was allowed use of the petitioner's mailing address as a courtesy to allow the beneficiary an address to use outside of his personal home address since the beneficiary came to the address to pick up supplies a couple of times per week. The evidence in the record suggests that the petitioner had two separate business addresses during this time, however, in any further filings, the petitioner must submit evidence to demonstrate that the job offered to the beneficiary was *bona fide* and not limited based on friendship or financial ties.

⁶ The director's NOR noted that [REDACTED] filed a Form I-140 to sponsor the beneficiary in 2001 and that the beneficiary stepped down from the presidency of that company for the pendency of that petition. The petitioner provided no explanation for the beneficiary's actions in response to the director's NOIR. On appeal, counsel stated that the beneficiary stepped down from the president position to allow a co-worker who spoke better English to take required certifications to get licenses for particular jobs. Once that co-worker did not sufficiently prepare for the certifications, the beneficiary resumed the previous position as president. 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). Although the timing of the beneficiary's abdication as well as having a second corporation run by the beneficiary's wife and business partner is suspect, it does not form the basis of the AAO's decision.

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 Form 9089 was accepted for processing by the DOL on February 17, 2006. The rate of pay or the proffered wage specified on the ETA Form 9089 is \$960.00 per week or \$49,920.00 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (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.

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 AAO's NOID/NDI requested financial documentation of the petitioner's ability to pay the proffered wage from 2006 through 2012.⁷ The petitioner's tax returns demonstrate its net income for those years, as shown in the table below.

⁷ Counsel on appeal stated that an extension had been requested and granted so that the petitioner's

- In 2006, the Form 1120S stated net income⁸ of \$92,515.
- In 2007, the Form 1120S stated net income of \$21,586.
- In 2008, the Form 1120S stated net income of \$37,994.
- In 2009, the Form 1120S stated net income of \$61,923.
- In 2010, the Form 1120S stated net income of \$28,461.
- In 2011, the Form 1120S stated net income of \$44,867.

Therefore, for the years 2007, 2008, 2010, and 2011, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner demonstrated its ability to pay the proffered wage in 2006 and 2009 only.

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.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2007, 2008, 2010, and 2011, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of \$23,754.
- In 2008, the Form 1120S stated net current assets of -\$48,033.
- In 2010, the Form 1120S stated net current assets of \$78,999.
- In 2011, the Form 1120S stated net current assets of \$14,127.

2012 Form 1120S was not yet due.

⁸ 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 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 28, 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 2006, 2009, and 2011, the petitioner's net income is found on Schedule K of its tax return in those years.

⁹ 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.

Therefore, for the years 2007, 2008, and 2011, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner's net current assets in 2010 were sufficient to demonstrate the ability to pay the proffered wage in that year alone.

The petitioner submitted a July 11, 2013 letter from [REDACTED] stating that the petitioner has the financial ability to hire the beneficiary without creating any sort of hardship for the business. 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. A statement from an accountant, without an audited statement, is insufficient to demonstrate the petitioner's ability to pay the proffered wage.

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

In the instant case, the Forms 1120S do not reflect that the petitioner employed any workers directly in any year as no salaries and wages were reported on its tax returns. In addition, the gross receipts fluctuated greatly from year to year, with the highest gross receipts being in 2006. The petitioner did not submit any evidence of its reputation in the community or any reason that its business may have suffered an anomalous year in terms of revenue or higher than usual expenses. 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 be denied 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

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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.