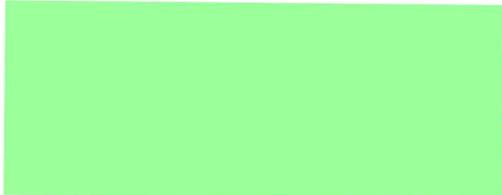


(b)(6)

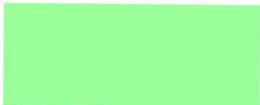


U.S. Citizenship
and Immigration
Services



DATE: JUN 03 2014

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a 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: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (director). The petitioner filed a motion to reopen/reconsider, which was denied by the director. The petition is currently on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an auto repair/management business. It seeks to permanently employ the beneficiary in the United States as an auto mechanic and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). This statutory provision 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 director denied the petition initially on the ground that the beneficiary would not be employed by the petitioner, but rather by another company. Since the regulations require that the petition be filed by the actual employer, the director determined that the instant petition could not be approved. On motion the director also found that the petitioner failed to establish its continuing ability to pay the proffered wage.

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.¹

Procedural history

The petition – Form I-140, Immigrant Petition for Alien Worker – was filed with the Texas Service Center on July 25, 2007. As required by statute, the petition was accompanied by an Application for Alien Employment Certification, Form ETA 750 (labor certification), which was filed with the U.S. Department of Labor (DOL) on August 13, 2003 (the priority date), and certified by the DOL on January 6, 2004.

On July 7, 2009, the director issued a Request for Evidence (RFE), advising that additional evidence was needed to establish the petitioner's ability to pay the proffered wage from the priority date up to the present. Noting that the labor certification listed the petitioner as the beneficiary's most recent employer (commencing work as an "auto mechanic" in December 2002), the director requested copies of the beneficiary's W-2 forms (Wage and Tax Statements) for the years 2003-2008. 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).

RFE also requested submission of the petitioner's quarterly payroll tax statements and Forms 941 for all calendar quarters from 2006 through 2009. In addition, the RFE requested evidence that six auto mechanics the petitioner claimed to have terminated had two years of experience in the position of auto mechanic, as is required for the instant petition.² Lastly, the RFE requested copies of the petitioner's 2007 and 2008 federal income tax returns or, alternatively, audited financial statements or annual reports for those years.

The petitioner responded to the RFE on August 20, 2009. The petitioner submitted copies of its quarterly payroll tax statements to the District of Columbia and its federal Forms 941 from the first quarter of 2006 through the second quarter of 2009, as well as its federal tax returns for the years 2007 and 2008. The petitioner also submitted a letter from its owner and president, dated August 3, 2009, "to clarify the company's general policy in hiring auto mechanics" and stating that "[w]e prefer mechanics with at least a two-year experience." The petitioner did not submit the other evidence requested in the RFE – specifically, copies of the beneficiary's Forms W-2 for the years 2003-2008.

Apart from the documentation discussed above, the petitioner submitted a second letter from Mr. dated August 14, 2009, for the purpose of "clarify[ing] the company's relationship with in particular with ." As explained by Mr. is the parent corporation of and three other companies, all of which, like the petitioner, are wholly owned by him. According to Mr. specializes in the sale and repair of used cars and taxicabs while the petitioner – has served as its "payroll company" since 1992. "All employees," Mr. wrote, "get their payroll checks from " which then bills for reimbursement of those expenses plus a fee. In view of this corporate relationship, Mr asserted that "looking at only the financial data of does not give a true picture of the financial health of the enterprise." Accordingly, Mr. stated that he was supplementing the record with copies of s federal income tax returns (Forms 1120) for each of the years 2003-2007. In closing his letter Mr. 'attest[ed] that . . . Inc. intend[s] to employ [the beneficiary] as an auto mechanic . . ."

In his denial decision, dated October 29, 2009, the director cited Mr. 's statements that was the intended employer of the beneficiary and that the petitioner "merely issues the payroll for ' Based on this evidence the director ruled that the petition could not be approved because it was not filed by the actual employer.

On November 30, 2009, the petitioner filed a motion to reopen/reconsider, claiming that it, not would be the beneficiary's actual employer. In another letter from the petitioner's owner

² With the petition, the petitioner submitted a letter indicating that it paid a total of six auto mechanics wages in 2005 and 2006, and listed the amounts paid to each. The petitioner's letter also indicated the dates that each auto mechanic was terminated.

and president, dated November 23, 2009, Mr. [REDACTED] explained the relationship of the two companies and the beneficiary as follows:

[REDACTED] and [REDACTED] are affiliates and staff on [REDACTED]'s payroll provides auto repair services to [REDACTED] employs auto mechanics who service and repair cars and taxicabs owned by [REDACTED] as well as outside cabs which are managed and serviced by [REDACTED] Although the beneficiary will be employed by [REDACTED] which will pay his salary and issue his W-2, report his payroll taxes to withholding federal, state and local agencies, and assign and direct his work, the ultimate user of the beneficiary's services as an auto mechanic is [REDACTED]

The petitioner also asserted that it had the ability to pay the beneficiary the proffered wage, and submitted additional financial documentation.

On January 21, 2010 the director denied the motion to reopen/reconsider. The director was not persuaded that the petitioner would be the actual employer of the beneficiary. In addition, the director determined that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date up to the present. In this connection, the director ruled that financial documentation of [REDACTED] and its subsidiaries, including [REDACTED] could not be considered in determining the petitioner's ability to pay the proffered wage because neither company was the beneficiary's intended employer.

The petitioner filed its appeal on February 23, 2010. A new letter was submitted from the petitioner's owner and president, dated February 22, 2010, in which Mr. [REDACTED] claimed that his prior letter of August 14, 2009 was poorly worded in referring to the beneficiary as an "employee" of [REDACTED]. According to Mr. [REDACTED] he should have written as follows:

[REDACTED] intends to **contract** with [REDACTED] for the services of [the beneficiary]" [REDACTED] assigns the auto repair/servicing work, hires and fires the auto mechanics, pays them, and issues their W-2s. [REDACTED] is [REDACTED]'s sole customer and contracts with [REDACTED] to service and repair various cabs. [REDACTED] is billed by [REDACTED] for the services rendered by [REDACTED]'s employees. . . . [Emphasis in the original.]

Copies were submitted of [REDACTED]'s federal income tax returns, Forms 1120S, for the years 2007 and 2008, supplementing those already in the record for the years 2003-2006, as well as the 2003 and 2004 W-2 forms issued to an individual employee who was terminated in August 2004 and whose duties the petitioner claimed would be performed by the beneficiary. The petitioner also submitted copies of the W-2 forms it issued to employees in the years 2005-2008, supplementing previously filed W-2 forms to its employees going back to 2003.

On December 18, 2012 the AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE). Stating that the evidence did not establish that [REDACTED] would be the

beneficiary's actual employer, the AAO advised the petitioner to submit any employment contracts between [REDACTED] and the beneficiary as well as any contracts between [REDACTED] and the entity for which the beneficiary actually performs the daily duties of an auto mechanic. The AAO requested the submission of the petitioner's federal income tax returns for the years 2009-2011, as well as the Forms W-2 or Forms 1099 it issued to the beneficiary for the years 2009-2011. Finally, the AAO requested additional evidence that the beneficiary had the requisite two years of experience in the job offered to qualify for the proffered position.

Counsel responded to the NOID/RFE on January 28, 2013, submitting copies of [REDACTED]'s federal income tax returns, Forms 1120S, for the years 2009-2011. Counsel did not provide copies of any Forms W-2 or Forms 1099 issued to the beneficiary for 2009-2011, nor any explanation of the beneficiary's employment status in those years. Counsel indicated that no employment contract exists between the petitioner and the beneficiary, nor any contract between [REDACTED] and [REDACTED]. Counsel cited a previously submitted letter from a prior employer as evidence that the beneficiary had more than two years of full-time experience in the job offered.

On May 31, 2013 the AAO issued a supplemental Request for Evidence (RFE). The petitioner was requested to submit a copy of an invoice from [REDACTED] to [REDACTED] for wages paid, as well as [REDACTED]'s income tax returns (federal or District of Columbia), or audited financial statements, or annual reports for each of the years 2002-2012.

Counsel responded to the RFE on June 25, 2013, with copies of [REDACTED]'s District of Columbia income tax returns for the tax years 2003-2012 (covering the time period of July 1, 2002 through June 30, 2012). For most of these years [REDACTED] did not file federal income tax returns on its own, but rather as part of its parent company [REDACTED]'s filing, according to an email message from the [REDACTED] group's controller, [REDACTED] dated June 12, 2013. Counsel also submitted Excel spreadsheets of the monthly payroll services administered by [REDACTED] on behalf of [REDACTED] from January 2005 through December 2012. The itemized expenses in the spreadsheets serve as de facto invoices, according to Mr. [REDACTED] in another email message dated June 19, 2013.

LAW AND ANALYSIS

Whether the Petitioner is the Form I-140 Employer

As noted above, the petitioner stated in one instance that it is operating solely as the payroll company to [REDACTED] and that [REDACTED] was the intended employer of the beneficiary, and when questioned further, stated instead that the petitioner has auto mechanics on staff who service and repair automobiles owned and/or managed by [REDACTED] and that the petitioner will contract with [REDACTED] for the services of the beneficiary. The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for

classification of the alien under...section 203(b)(3) of the Act.” The DOL regulation at 20 C.F.R. § 656.3³ states as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The regulation further states:

Employment means: (1) Permanent, full-time work by an employee for an employer other than oneself. ... the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

Id. The regulation also defines the job opportunity:

Job opportunity means a job opening for employment at a place in the United States to which U.S. workers can be referred.

Id.

Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* 20 C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

The petitioner does not dispute that the beneficiary's work as an auto mechanic will be performed on behalf of [REDACTED] repairing and servicing its vehicles. In his letter of August 14, 2009, the president and sole owner of both companies, [REDACTED] attested that [REDACTED] intended to employ the beneficiary as an auto mechanic. This statement would exclude the petitioner, [REDACTED] from the definition of employer. Following the director's initial denial of the petition, Mr. [REDACTED] in his letter of October 29, 2009, changed his description of [REDACTED] to "the ultimate user of the beneficiary's services" rather than his employer. [REDACTED] would be the beneficiary's employer, Mr. [REDACTED] claimed, citing its functions such as paying his salary, withholding taxes,

³ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

issuing his W-2 forms, and assigning his work. In his subsequent letter of February 22, 2010, Mr. [REDACTED] reiterated these claims.

It is unclear from the record whether the petitioner will be the beneficiary's employer and was authorized to file the instant petition, or if the Department of Labor was cognizant that the petitioner was acting as a contractor to [REDACTED] at the time it considered the labor certification. A labor certification is valid only for the particular job opportunity stated on the ETA Form 9089 or (before March 28, 2005) the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2). While the petitioner states on the Form ETA 750, Part A, that it will employ the beneficiary as an auto mechanic, Mr. [REDACTED]'s first letter indicates that the petitioner is a payroll company for the intended employer, [REDACTED].

In the labor certification application filed by Mr. [REDACTED] in August 2003, the beneficiary's most recent employer is listed as [REDACTED] where the beneficiary claims to have commenced work as a full-time auto mechanic in December 2002. Yet the beneficiary's name does not appear in the list of employees in any of [REDACTED]'s quarterly payroll statements to the District of Columbia between the beginning of 2006 and the middle of 2009. The letters in the record from Mr. [REDACTED] dating from 2007 and 2010, imply that the beneficiary was not yet employed, but are not conclusive on this point. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

Both the director and the AAO have tried to clarify the beneficiary's employment status by requesting copies of the Forms W-2 or the Forms 1099 issued to the beneficiary over the years. The director requested copies of the beneficiary's W-2 forms for the years 2003-2008 in the initial RFE of July 7, 2009. The petitioner did not submit the requested W-2 forms, nor provide an explanation for their omission. The AAO requested copies of the beneficiary's Forms W-2 or 1099 for the years 2009-2011 in the NOID/RFE of December 18, 2012. Once again, however, the petitioner did not submit the requested forms, nor provide an explanation for their omission. Despite identifying itself as the beneficiary's employer on the Form ETA 750 in August 2003, therefore, the petitioner has failed to document its claim at any point in time up to the present.

Thus, the petitioner has failed on multiple occasions to submit requested forms that would identify the beneficiary's employer (in the case of Form W-2) or his contractor (in the case of Form 1099) in each and every year from 2003 through 2011. As provided in 8 C.F.R. § 103.2(b)(14), the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

In this case, the petitioner has not demonstrated that it intends to employ the beneficiary in the position described on the Form I-140 petition and the ETA Form 750 labor certification. The record does not contain any contracts for work already performed or to be performed between the petitioner and [REDACTED]. The petitioner has not submitted invoices for work performed, a lease, an organization

chart, photographs, business licenses or other indicia that it is a business that contracts to provide auto mechanic services to [REDACTED] or to any other company. Without evidence to support its assertions, such as contracts or other business records describing the relationship between these entities, the AAO cannot conclude that the petitioner intends to employ the beneficiary as contemplated under the regulations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The record lacks evidence that the petitioner is an employer with a job opportunity, which it could document as permanent and full-time with payroll records, to which U.S. workers may be referred for employment. This casts doubt on whether the petitioner intends to employ the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*. 19 I&N at 591-592

In view of the fact that the petitioner claims to have employed the beneficiary as an auto mechanic since December 2002 but has not provided any documentary proof that it has actually done so, the AAO is not persuaded that [REDACTED] intends to employ him in that position. The AAO determines that the petition is not supported by a *bona fide* job offer from Auto Management.⁴ *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Accordingly, the petition cannot be approved, and the appeal will be dismissed.

Ability to Pay the Proffered Wage

Even if [REDACTED] established its intent to employ the beneficiary, the petition could not be approved unless [REDACTED] could establish its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part as follows:

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

⁴ 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).

annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personal records, may be submitted by the petitioner or requested by the Service.

Thus, the petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application, Form ETA 750, was received by the DOL on August 13, 2003. Part 6, item 9 of the Form I-140 petition, filed in July 2007, states that the wages are \$764.40 per week. Based on a work year of 52 weeks, the annualized proffered wage amounts to \$39,748.80.

Counsel asserts that because [redacted] and [redacted] are affiliated companies, both owned by [redacted] U.S. Citizenship and Immigration Services (USCIS) should take the financial resources of [redacted] into consideration in determining whether the petitioner has the ability to pay the proffered wage. We disagree. Though [redacted] and [redacted] have identical ownership, they are structured as separate corporations and they file separate tax returns. 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." Accordingly, the financial resources of [redacted] will not be considered in determining the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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 this case, although the petitioner claims to have hired the beneficiary in December 2002, there is no evidence in the record of any compensation paid to the beneficiary

since then. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its actual compensation to the beneficiary over the years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. See *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. See *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).

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 [sic] 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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

As recorded on the federal income tax returns in the record – Form 1120S for each of the years 2003 through 2011 – the petitioner's net income over the years was as follows:⁵

2003:	\$ 32,492
2004:	\$ 33,169
2005:	\$ 1,456
2006:	\$ 8,951
2007:	\$ 30,179
2008:	\$ 25,086
2009:	\$ 15,500
2010:	\$ 48,333
2011:	\$ 45,682

As these figures show, net income exceeded the proffered wage of \$39,748.80 only in the years 2010 and 2011. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its net income over the years.

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax returns. 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, of the Form 1120S. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total

⁵ For an S corporation like the petitioner, if its 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 IRS Form 1120S. However, if 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 (for the tax years at issue in this proceeding). See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

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.

of a corporation's end-of-year net current assets is 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.

As recorded on in its federal income tax returns for the years 2003-2011, the petitioner's net current assets year by year were as follows:

2003:	\$ 29,425
2004:	\$ 19,789
2005:	\$ 25,340
2006:	\$ 3,283
2007:	\$ 4,501
2008:	\$ -12,646
2009:	\$ 15,205
2010:	\$ 38,227
2011:	\$ 30,129

As these figures show, the petitioner's net current assets were below the proffered wage of \$39,748.80 every year. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its net current assets over the years.

In sum, the foregoing analysis shows that, except for the years 2010 and 2011, the petitioner has not established its ability to pay the proffered wage of the job offered by any of the three methods discussed above – (a) compensation actually paid to the beneficiary, (b) the petitioner's net income, or (c) the petitioner's net current assets.

On appeal counsel points out that, for the years 2003 and 2004, adding the petitioner's net income and its net current assets would result in figures that exceed the proffered wage in each of those years. According to counsel, this methodology establishes the petitioner's ability to pay the proffered wage in 2003 and 2004. This approach is unacceptable, however, because net income and net current assets are not cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage – one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel asserts that the beneficiary will replace other employees who worked for the petitioner as auto mechanics during the time period of 2003-2008 but were terminated. In counsel's view, the compensation paid to those former employees should be included in calculating the petitioner's ability to pay the proffered wage in the years 2003-2008. As tallied by Mr. [REDACTED] in letters dated July 6, 2007, November 23, 2009, and February 22, 2010, 13 of the auto mechanics employed and paid by the petitioner in the years 2003-2008 were terminated – one in 2004, four in 2006, three in 2007, and five in 2008. The wages paid to those employees year by year (backed by W-2 forms in the record) were as follows:

2003	\$17,109.50
2004	\$10,995.00
2005	\$77,698.83
2006	\$40,012.17
2007	\$41,489.85
2008	\$10,123.91

According to counsel, the funds paid to these auto mechanics could have been utilized to pay the prevailing wage to the beneficiary in each of the above years except 2008. In 2003 and 2004 the wages paid to the one terminated employee, combined with the petitioner's net income each of those years, exceeded the prevailing wage. In 2005, 2006, and 2007 the wages paid to terminated employees exceeded the prevailing wage each year. In 2008, however, the wages paid to the terminated employees, even when combined with the petitioner's net income, falls \$4,539.61 short of the proffered wage. (There were no net current assets in 2008, since current assets were exceeded by current liabilities.) Moreover, it is not clear that the wages of the terminated employees in 2006 would have been available to pay the beneficiary's proffered wage. The quarterly payroll statements in the record show that [REDACTED]'s employee total remained steady in 2006 (with 20 in the first quarter, 19 in the second quarter, 19 in the third quarter, and 20 in the fourth quarter) and that its employee wages also remained steady in 2006 (\$86,352.59 in the first quarter, \$80,988.48 in the second quarter, \$88,975.98 in the third quarter, and \$88,162.12 in the fourth quarter). Thus, the terminated employees in 2006 were replaced by other workers, and there were no wage savings that could have been utilized to pay the beneficiary's proffered wage that year.⁷

In general, wages already paid to others are not available to prove a petitioner's ability to pay the wage proffered to the beneficiary from the priority date of the petition up to the present. In this case, even if the AAO were persuaded that wages from terminated auto mechanics could have been utilized to pay the beneficiary's proffered wage for some of the years in question, they would not

⁷ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

have been sufficient to cover the proffered wage in the years 2006 and 2008, at the minimum. Nor is there any evidence that they could have covered the proffered wage in 2009, since there is no evidence in the record regarding the termination of auto mechanics and their total wages that year.

For the reasons discussed above, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present by utilizing the wages of terminated employees who performed the same duties as the auto mechanic position described in the labor certification and the instant petition.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612.⁸ USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner stated in its Form I-140 that it began operations in 1992 and had 19 employees at the time the instant petition was filed in 2007. The federal income tax returns in the record show that the petitioner's gross receipts were approximately \$660,000 in 2003, but declined each year thereafter until 2009, bottoming out at approximately \$394,000 that year, before rebounding modestly in 2010 and 2011 to around \$440,000 and \$453,000, respectively. Thus, the petitioner's business volume declined by about 40% during the six-year time period of 2003-2009, and in 2011 was still 30% less than in 2003. Thus, the petitioner has not demonstrated a history of growth in the past decade based on its gross receipts year by year. The petitioner's business appears, rather, to have suffered a decline.

⁸ 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.

For all of the reasons discussed in this decision, the AAO concludes that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage of the job offered from the priority date up to the present. For this reason as well, the petition cannot be approved, and the appeal will be dismissed.⁹

Conclusion

For the above state reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The appeal is dismissed.

⁹ While the AAO also raised the issue of whether the beneficiary meets the educational, training, and experience requirements for the job as specified on the labor certification, we are satisfied, based on the evidence of record, that the beneficiary meets the requisite criteria.