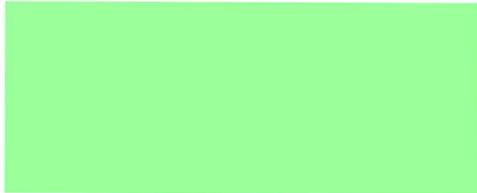


(b)(6)

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



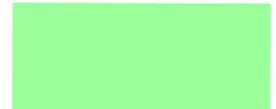
U.S. Citizenship
and Immigration
Services



DATE: **MAY 22 2014**

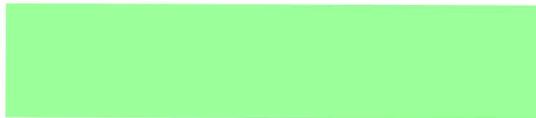
OFFICE: TEXAS SERVICE CENTER

FILE:



Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal and motion to reopen and to reconsider were dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO again on a motion to reopen and reconsider. The motion to reopen will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

The petitioner is an ethnic food and specialty store. It seeks to employ the beneficiary permanently in the United States as a specialty chef. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary was qualified for the position. The director denied the petition accordingly.

As set forth in the AAO's decisions, the issues in this case are whether the petitioner established the beneficiary's three years of prior work experience as a specialty chef as required in the approved labor certification, and whether the petitioner has the ability to pay the proffered wage as of the priority date.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor

certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 36 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: Knowledge of ethnic cuisine.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an Embassy Chef with the Embassy of [REDACTED] in Washington D.C. from August 22, 2001 until July 31, 2004.¹ No other experience is listed.² The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(I)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In connection with a previous application for the same beneficiary, the petitioner submitted letters of experience for the beneficiary, including: an experience letter from [REDACTED] Ambassador Extraordinary and Plenipotentiary of [REDACTED] to the United States of America on his letterhead, dated April 7, 2001, stating that the embassy employed the beneficiary as a chef from November 1996 until September 1999;³ experience letter from [REDACTED] Deputy Chief of Mission to the Embassy of the [REDACTED] from 2000 to 2004, not on Embassy letterhead, dated June 15, 2004, stating that the beneficiary was employed from August 2000 through the date of the letter as a chef; experience letter from [REDACTED] Ambassador

¹ We note that the experience listed on the ETA Form 9089 does not equal 36 months. The experience claim on the Form 9089 only accounts for 34 months of experience.

² The labor certification requests the beneficiary to list all former work experience that would qualify the beneficiary for the position.

³ On the Form 9089 the beneficiary did not list his employment with the [REDACTED] from November 1996 until September 1999. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Extraordinary and Plenipotentiary of [REDACTED] to the United States of America on embassy letterhead, stating he has known the beneficiary as a chef from August 2001 until October 2003.⁴ The record contains a second experience letter from Mr. [REDACTED] dated December 10, 2006 stating that the beneficiary was employed as the Ambassador's Chef; however, the experience letter does not contain the beneficiary's dates of employment. The record also contains an experience letter from [REDACTED], Ambassador, on Embassy of [REDACTED] letterhead, dated June 15, 2004, claiming that the beneficiary was employed as a cook from October 2001 until June 2004 at the Embassy of the [REDACTED] in Washington D.C.

On October 12, 2004, the beneficiary executed a Form G-325 Biographic Information in connection with an application to adjust status to lawful permanent residence, in which he indicated that he worked for [REDACTED] in [REDACTED] from 1996 through August 2001. The Form G-325 signed by the beneficiary, under penalty of perjury, is in direct conflict with the experience letters above, which claims that the beneficiary worked for the [REDACTED] Embassy in Washington D.C. from 1996 to 1999 and 2000 until 2004.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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... 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.

On June 9, 2006, the beneficiary executed another Form G-325 in connection with a second application to adjust status, in which he indicated that he worked as a chef in [REDACTED] from 1978 through August 2001.

On appeal of the director's decision in the instant case denying the petition, the petitioner provided a letter dated February 18, 2009 from Mr. [REDACTED] who notes that the discrepancy between October 2003 and July of 2004 for the beneficiary's end dates of employment was due to the transition from one ambassador to another.⁵ We find that this is a reasonable explanation and find that more likely than not that the beneficiary was employed as a chef from August 22, 2001 until July 1, 2004. As noted previously, this experience does not equal three years of relevant work experience.

In the instant motion, the petitioner through counsel claims that any reference to the beneficiary's Forms G-325 should be ignored because the beneficiary did not complete the forms. Counsel asserts that the Forms G-325 were completed by an unknown unscrupulous lawyer. Although counsel

⁴ This undated experience letter provides about 26 months of possible experience as a specialty chef with the Embassy of [REDACTED]

⁵ Mr. [REDACTED]'s letter does not address the inconsistency in the evidence between the letter from [REDACTED] which stated that the beneficiary worked in Washington DC from 1996 until 1999, and the beneficiary's statements that he worked in [REDACTED] until 2001.

claims that prior counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant motion does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Further, counsel has provided copies of the beneficiary's passport pages to include visas issued to the beneficiary as well as admission stamps. However, while the passport reflects that visas were issued on behalf of the beneficiary for employment with the Embassy of [REDACTED] all pages of the copied passport are not included and the passport does not establish that the beneficiary was employed in a continuous full time capacity with the embassy in the United States. The record does not establish the beneficiary's three years of required work experience.

The AAO and the director both found that the petitioner had not established the ability to pay the proffered wage.

At the outset, the AAO notes that the petitioning entity, [REDACTED] Federal Employer Identification Number (FEIN) [REDACTED], is not the same entity that filed the Form ETA 9089 Application for Labor Certification, [REDACTED] LLC, FEIN [REDACTED]. The record does not describe the relationship between the two companies, nor does it establish a successor-in-interest relationship between the petitioner and the company that filed the labor certification application. As such, the labor certification is not valid. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, and does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

In the NOID we noted a discrepancy between the petitioner's name and employer identification number and the applicant for the ETA 9089. The petitioner through counsel claims that the

discrepancy was due to a typographical error. The president of [REDACTED] LLC, [REDACTED] states in a letter dated February 19, 2014 that there is another entity by the name of [REDACTED] with a different FEIN and that he has no control over or information of this company and that [REDACTED] LLC is not connected to the petitioner, [REDACTED]. Counsel's brief suggests that unscrupulous attorneys may be filing petitions using the name of [REDACTED] with a different FEIN number. USCIS records reflect that [REDACTED] FEIN [REDACTED] filed four Form I-129 petitions and the current Form I-140 petition utilizing the FEIN of [REDACTED]. Counsel fails to explain how the petitioner's previous counsel, [REDACTED] made a typographical error using the same FEIN [REDACTED] that the petitioner's owner knows nothing about. 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). The record does not reflect that the petitioner's use of this FEIN is a typographical error.

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 June 22, 2006. The proffered wage as stated on the ETA Form 9089 is \$11.60 per hour (\$24,128 per year).

The evidence in the record of proceeding shows that the entity that filed the labor certification is structured as a multi-member LLC S corporation. There are no tax returns for the petitioner in the record. The tax returns in the record belong to [REDACTED] LLC, a company that was formed in 2002 and whose fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 40 workers.

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 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, [REDACTED], FEIN [REDACTED], has not demonstrated that it paid the beneficiary any wages. Further, as there are no tax returns of the petitioner in the record, the petitioner has not established that it has the ability to pay the proffered wage in any year. Thus, the petition must be denied for this additional reason.

Even if the petitioner were to establish a successor-in-interest relationship with the entity that filed the labor certification, [REDACTED] LLC, FEIN [REDACTED] it still has not established that it has the ability to pay as required by the regulation. For purposes of this decision only, the AAO will assume that the petitioner has established a successor-in-interest relationship with [REDACTED] LLC. [REDACTED] LLC paid the beneficiary \$23,137.88 in 2006, which is less than the proffered wage. The record establishes that [REDACTED] LLC paid the beneficiary more than the proffered wage in 2007 and 2008. Thus, assuming the successor-in-interest relationship with [REDACTED] were established, the petitioner would have to demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2006, a difference of \$990.12, and from 2009-2013.⁶

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

⁶ As indicated in the previous decision of the AAO, the petitioner submitted payroll information indicating that [REDACTED] LLC paid the beneficiary \$1,001.40 in 2009, a deficiency of \$23,126.60. In any further proceeding, the petitioner must establish a successor-in-interest relationship with [REDACTED] LLC, and its ability to pay the beneficiary of the instant petition and other sponsored workers from 2009-2013.

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 record before the AAO closed on December 2, 2013 with the receipt by the AAO of the petitioner's submissions in response to the AAO's notice of intent to dismiss (NOID) dated October 31, 2013. As of that date, the petitioner's 2013 federal income tax return was not yet due. Therefore, the income tax return of [REDACTED] LLC for 2012 is the most recent return available. The tax returns in the record relate to [REDACTED] LLC and demonstrate [REDACTED] LLC's net income for 2006, 2009, 2010, 2011, and 2012 as shown in the table below.

- In 2006, the Form 1120S stated net income⁷ of \$2,286.
- In 2009, the Form 1120S stated net income of -\$34,542.
- In 2010, the Form 1120S stated net income of -\$55,162.
- In 2011, the Form 1120S stated net income of -\$49,379.
- For 2012, the Form 1120S stated net income of -\$34,111.

On October 31, 2013, the AAO notified the petitioner and counsel that it had identified 3 additional beneficiaries sponsored by the petitioner. The petitioner through counsel responded on December 2, 2013 and claimed that two of the beneficiaries no longer worked for the petitioner. The petitioner provided no evidence that the petitions for these additional beneficiaries were ever withdrawn. Thus, the petitioner has failed to establish that it had sufficient net income to establish its ability to pay the beneficiary and three additional beneficiaries the proffered wage for 2006, 2009, 2010, 2011, and 2012.⁸ 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)).

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. [REDACTED] LLC's tax returns demonstrate its end-of-year net current assets for 2006, 2009, 2010, 2011, and 2012 as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$414,249.
- In 2009, the Form 1120S stated net current assets of \$139,933.
- In 2010, the Form 1120S stated net current assets of \$79,849.
- In 2011, the Form 1120S stated net current assets of \$42,722.
- For 2012, the Form 1120S stated net current assets of -\$10,704.

⁷ 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.

⁸ The petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The failure of the petitioner to provide this evidence cannot be excused.

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.

For the years 2006, 2009, 2010, 2011, and 2012, [REDACTED] LLC's failure to provide evidence for all of its sponsored workers has prevented the AAO from determining the petitioner's ability to pay the proffered wage for four workers out of its net current assets. We find it more likely than not that the petitioner has not demonstrated its ability to pay the proffered wage through either the net income or net current assets of [REDACTED] LLC for the years 2006 and 2009 through 2012. Therefore, 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 beneficiaries the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, or its net income or net current assets.

Counsel asserts on motion that the beneficiary will replace another employee once the immigrant petition becomes approved. The evidence in the record names the worker, contains competent evidence of the wages paid and full time employment, verifies that their duties are those of the proffered position as set forth on the ETA 9089, and contains evidence that the petitioner has replaced or will replace the worker with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary for 2011, 2012, and 2013.¹⁰ Nevertheless, the petitioner must still establish the ability to pay all of its sponsored workers. Even though we may credit the wages of the one worker back to the petitioner, the record still does not reflect the proffered wages of the other beneficiaries, and whether and/or how much each was paid.

The petitioner has not established its ability to pay the proffered wage to all of its beneficiaries in 2006 and from 2009- 2013. On motion the petitioner states that the AAO has made a mistake and confused the petitioner with another company. In addition, counsel asserts that the petitioner no longer sponsors the additional beneficiaries, but the petitioner has offered no evidence that those petitions were withdrawn. USCIS records reflect that the following receipt numbers of Form I-140 petitions were filed by [REDACTED] LLC, FEIN [REDACTED] and the dates of filing:

[REDACTED] I-140 filed June 4, 2007

[REDACTED] I-140 filed October 26, 2005

Thus, [REDACTED] LLC's claim that it did not file other petitions is inaccurate.

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

¹⁰ 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.

new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner appears to have been in business since 1996 and employs 40 workers. The petitioner shows its gross receipts and wages paid to its workers have lowered over time. Over the last three years, the petitioner has reported negative net income. Further, its net current assets have also reduced over time. The record is silent concerning the petitioner's reputation within its industry, the occurrence of any uncharacteristic business expenditures or losses, or whether the beneficiary is replacing a former employee or an outsourced service. 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 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 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 motion is granted and the appeal decision of the AAO is affirmed. The petition remains denied.