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

(b)(6)

DATE: MAR 1 3 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 preference visa petition was initially approved by the Director, Texas Service Center on August 27, 2008. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR) dated October 30, 2013. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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 describes itself as a software design, development and consultation company. It seeks to permanently employ the beneficiary in the United States as a software engineer (jr.). The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The Director, Texas Service Center revoked the approval of the petition. The director's decision concludes that the organization did not establish an ability to pay the proffered wages of all of its beneficiaries from the priority date in 2007 onwards.

We note that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, and sought additional information concerning the petitioner's ability to pay for all of its sponsored beneficiaries, *bona fides* of the job offered, evidence of the beneficiary's work location, and thus was properly issued for good and sufficient cause.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

[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 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).

> *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, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on June 25, 2007. The proffered wage as stated on the ETA Form 9089 is $65,000 per year. The ETA Form 9089 states that the position requires an advanced degree.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in [redacted] and to currently employ 60 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 31, 2007, the beneficiary claimed to have worked for the petitioner since May 5, 2005.

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, 144 (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, 614-15 (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.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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.*, 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 also Taco Especial*, 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 St. 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).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets (NCA) are the difference between the petitioner's current assets and current liabilities.[2] The petitioner'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 the petitioner's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

In the instant case, the petitioner demonstrated that it paid the beneficiary for the following years:

Year	Form W-2	Proffered Wage	Remaining Wage
2007	$71,883.00	$65,000.00	$0.00
2008	$66,027.50	$65,000.00	$0.00
2009	$37,500.00	$65,000.00	$27,500.00
2010	$60,000.00	$65,000.00	$5,000.00
2011	$60,000.00	$65,000.00	$5,000.00
2012	$56,000.00	$65,000.00	$9,000.00
2013	$84,000.00	$65,000.00	$0.00

The petitioner demonstrated that it paid the beneficiary the full proffered wage in 2007, 2008 and 2013, and partial wages in the other relevant years.

USCIS records reflect that the petitioner has filed for at least another 80 Immigrant Petitions for Alien Worker (Form I-140). Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

On November 13, 2014, we sent the petitioner a notice of Intent to Dismiss (NOID) the appeal. In our NOID we informed the petitioner that it had petitioned for at least 80 additional beneficiaries and we required specific information concerning those beneficiaries. We also sought a copy of the petitioner's 2008 federal income tax returns. The petitioner responded to our NOID on December 15, 2014. We have received some evidence from the petitioner concerning the additional beneficiaries. In its response, the petitioner claims to have petitioned for 14 individuals that have been approved and their legal permanent residence is currently pending. The petitioner claims that all other petitions have been withdrawn or the beneficiaries have obtained legal permanent residence. The record does not establish the petitioner's claim.[3] Current government records establish that at least 72 petitions are still pending or were pending from 2007 through 2014. Further, the petitioner failed to provide a copy of its 2008 federal income tax return.

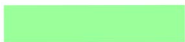
In response to our NOID, the petitioner submitted a chart listing the name, status of employment, petition status, priority date, proffered wage and wages paid for some of its beneficiaries. Even if we accept the petitioner's chart as an accurate reflection of wages it owed to all of its sponsored beneficiaries from 2007 to 2013, the total wages the petitioner claims it owed are as follows:

Tax Year	Number of Beneficiaries Claimed	Total Proffered Wages
2007	4 filings [1 in 2004 + 3 in 2007]	$259,587
2008	2 filings [additional wages of $110,000]	$369,587
2009	3 filings [additional wages of $177,034]	$546,621
2010	No filings	$546,621
2011	4 filings [additional wages of $341,000]	$887,621
2012	1 filing [additional wages of $72,000]	$959,621
2013	7 filings [additional wages of $664,000]	$1,623,621

In his response to our NOID, counsel claims that the petitioner's wage obligations were $496,805 in 2009 and 2010, $837,805 in 2011, and $909,805 in 2012. Nothing in the record demonstrates how counsel arrived at these figures. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record before the director closed on October 30, 2013 with the receipt by the director of the petitioner's submissions in response to the director's NOIR. As of that date, the petitioner's 2013

[3] The evidence provided included Forms W-2 and a spreadsheet of beneficiaries. However, the petitioner did not include the proffered wage, date of withdrawal, date of denial, or date that a beneficiary became a lawful permanent resident for all of the beneficiaries.



federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2012 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2007 through 2013, as shown in the table below.

Tax Year	Total Wages Owed	Wages Paid	Net Income	NCA
2007	$259,587	$0	Unknown	Unknown
2008	$369,587	$110,000	Unknown	Unknown
2009	$546,621	$177,034	$16,494	$230,798
2010	$546,621	$0	$38,949	$285,107
2011	$887,621	$341,000	$150,674	$ 547,880
2012	$959,621	$72,000	$547,800	$ 952,966
2013	$1,623,621	$664,000	Unknown	Unknown

Based on the information contained in the record and provided in response to our NOID, the petitioner has not established its ability to pay the proffered wage to all of its beneficiaries through an examination of its net income or net current assets.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from 2007 through 2013 through an examination of wages paid to its beneficiaries, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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 Sonegawa*, 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion,

consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since and claims to employ 60 workers. The record demonstrates that the petitioner has paid wages less than the total proffered wages owed to all of its sponsored beneficiaries in all relevant years. Further, the petitioner failed to provide all of the requested information we had asked for concerning its multiple beneficiaries and any regulatory-prescribed evidence for 2007 and 2008. Although the petitioner's tax returns reflect increasing gross receipts since 2009 and over $3 million in wages and salaries for 2009 through 2012, the record is silent concerning the petitioner's financial picture in 2007 and 2008, the occurrence of any uncharacteristic business expenditures or losses in those years, or the petitioner's reputation within its industry. Further, the failure to provide all of the information requested for concerning multiple beneficiaries prevents us from reasonably establishing the petitioner's financial picture for 2009 through 2012. While the regulation at 8 C.F.R. § 204.5(g)(2) permits the submission of additional evidence "in appropriate cases," the regulation does not state that additional evidence can demonstrate a petitioner's ability to pay the proffered wage without the submission of the regulatory required evidence. Thus, in assessing the totality of the circumstances in this individual case, we conclude that the petitioner has not established that it had the continuing ability to pay the proffered wage from the 2007 priority date and in all relevant years.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.