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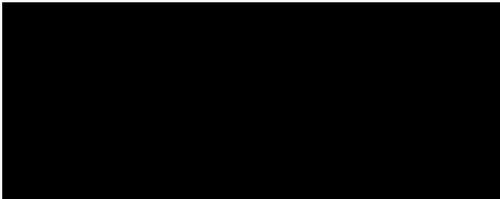
Office: VERMONT SERVICE CENTER

Date: OCT 20 2005

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition. The petitioner submitted a motion to reopen to the director that was subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fruit and vegetable store. It seeks to employ the beneficiary permanently in the United States as a wholesale buyer/manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Accordingly, the director denied the petition.

On appeal, the petitioner submits a new statement, and the brief previously submitted to the director.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$53,000 annually. On the Form ETA 750B, signed by the beneficiary in April 2001, the beneficiary claimed to have worked for the petitioner since May 2001. It is noted that the beneficiary in Form G-325A, Biographic Information, signed by the beneficiary in 2003, and submitted as part of the beneficiary's Form I-485, indicates that the beneficiary began working for the petitioner in January 2002, and that he also worked from March 2001 to April 2002 for Golden Pizza, in Springfield, Massachusetts.

The petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$650,696, a net annual income of \$36,219 and to currently employ four to six workers. In support of the petition, the petitioner submitted a letter of employment verification for the beneficiary from Tuncay Topcu, President, Sera Ticaret, Ankara, Turkey. The petitioner also submitted Form 1040, individual tax return for 2002. This document indicated the

petitioner had an adjusted gross income of \$33,660 in 2002. The petitioner also submitted a letter of support that explained that the petitioner had been in the fresh produce business for the past twenty years, and that the petitioner's business, located in Springfield, Massachusetts was established in 1997. The petitioner stated he provides wholesale/retail fresh fruits and vegetables to the public at large, local restaurants, and other eating establishments in the immediate area. The petitioner further stated that the beneficiary's job would include traveling daily to markets in Boston and Hartford to buy fresh produce; proper placement of the produce on store shelves, distribution of the produce to local food establishments, management of retail sales, and training of new employees as needed.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 21, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 federal income tax return, with all schedules and attachments. If the petitioner's business was a sole proprietorship, the director requested that the petitioner submit the owner's individual tax return, Form 1040, with Schedule C. If the petitioner employed the beneficiary, the director requested that the petitioner submit copies of the beneficiary's Forms W-2 Wage and Tax Statements. The director also requested an itemized list of all monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, for 2001 and 2002. The director stated that additional evidence such as accredited profit/loss statements, bank account records, or personnel records might be considered to establish the petitioner's ability to pay the proffered wage, but only as supplementary evidence.

In response, former counsel for the petitioner stated that the petitioner sold its former business location in Chicopee, Massachusetts in July 2000, and the business closed in October 2000. The new business site in Springfield was located in late 2000, and renovations to the site began in early 2001. According to counsel, the petitioner opened his new business in late May/early June of 2001. Counsel then stated that Citizenship and Immigration Services (CIS) has long recognized that smaller businesses must rely upon a multitude of methods to establish their ability to pay proffered wages. Counsel asserted that depreciation and assets might be considered. In addition, counsel stated that the petitioner may combine its net profit and monthly bank account balance to meet the proffered wage requirement. Counsel cites to *In re X*, 13 Immig. Rptr. B-2-259 (Oct. 7, 1994).

Former counsel stated that in the instant petition, the petitioner's ability to pay the proffered wage is established by a combination of its adjusted gross income, depreciation, elected mileage deduction, as well as assets and equity. With regard to tax year 2001, counsel stated that the petitioner's net profit of \$19,064 only reflects six months of business operations. Counsel stated that the shortfall of the proffered salary from the petitioner's net income in 2001 was \$33,936; however if \$3,298 in depreciation and \$2,960 of elected mileage deductions were added to the income as potential sources of revenue, the shortfall in 2001 was \$27,678. Counsel broke this shortfall down into a monthly shortfall of \$2,306.50. Counsel then examined how this shortfall could have been met through the petitioner's gross profit, or by the petitioner's equity in his house and the substantial proceeds, namely \$105,000, from the sale of the petitioner's former business location in Chicopee, Massachusetts. Counsel stated that the petitioner had \$53,000 equity in his personal residence, based on a down payment of \$53,000 toward the purchase price of \$72,000. Counsel also noted that the business income for 2001 only reflected six months of operation and that if the 6-month earnings were

extrapolated into one-year earnings, the petitioner would have had a net income of \$50,644. Based on this net income, the remaining shortfall in the wage could have been covered by the profits gained from the sale of the former business location. Counsel further noted that because the petitioner has no mortgage or rental expenses, his monthly personal expenses are low, and there the petitioner is able to support his family while still paying the proffered wage.

With regard to tax year 2002, former counsel stated that in 2002, the beneficiary was paid \$31,200 and that the remaining shortfall of \$21,800 from the proffered wage of \$53,000 was covered by the petitioner's net profit of \$36,219. Counsel also stated that the petitioner had additional funds in the form of elected expenses and equity in his residence. Counsel also noted that the petitioner elected to make many improvements to his business. Counsel stated that these improvements were not obligatory, and the funds used to make these improvements could have been available to pay the beneficiary's wages if necessary. Counsel submitted the following documents:

The petitioner's 2001 Form 1040, with Schedule C and all other schedules. Counsel noted that the net income of \$19,064 reflected activity from August 2001 to December 31, 2001. Counsel also identified the adjusted net income of \$25,322, which consisted of the net profit, plus depreciation of \$3,298 and mileage expense of \$2,960.

The petitioner's 2002 Form 1040 with all schedules. Counsel stated that the management fee deducted on Schedule C, page 2, line 39 of \$31,200 represented monies paid to the beneficiary. Counsel also noted that the 2002 tax return did not reflect ending inventory with an estimated value of \$6,000. Counsel again added the net income of \$36,219, the depreciation of \$12,470, mileage expenses of \$15,077, and the understatement of ending inventory of \$6,000 to calculate an adjusted net income of \$69,766 for 2002.

Records and receipts of renovations for the new business location in Springfield, Massachusetts. This group of documents includes receipts for air-conditioning units, and supplies that cover a period in mid-2001. The documents also include a automobile purchase document dated July 2002 that indicates a cash down payment of \$11,000.

A letter signed by [REDACTED] Feeding Hills, Massachusetts, dated October 3, 2003. This letter states that the petitioner's projected net income for 2003 is \$46,088, and that the net income is lower than expected because the petitioner is reinvesting his profit back into the business. [REDACTED] stated that this is possible because the petitioner's home is paid in full and his living expenses are low.

An itemized list of monthly personal expenses for 2001 and 2002. For 2001, the petitioner's monthly expenses were \$1,310, or \$15,720 annually. In 2002, the petitioner's monthly expenses were \$1,460, or \$17,520 yearly.

Purchase and Sale Agreement for the previous store location at 33 Grattan Street, Chicopee, Massachusetts, dated December 17, 1999. The document states that the property would be conveyed on July 31, 2000.

Purchase and Sales Agreement for the petitioner's purchase of a residence in Springfield, Massachusetts, in October 2000.

Documents with regard to the petitioner that include the petitioner's birth certificate, with certified translations, the petitioner's Permanent Resident card, and pages from the petitioner's passport containing biographical information.

On January 12, 2004, the director denied the petition. In his denial, the director noted the petitioner had to establish the ability to pay the proffered wage and also an ability to support his family. The director stated that the initial petition with the petitioner's 2002 individual tax return that showed an adjusted gross income of \$33,660, did not establish the petitioner's ability to pay the proffered wage. With regard to the evidence submitted in response to the director's request for further evidence, the director noted that the petitioner's 2001 individual tax return showed an adjusted gross income of \$17,717. The director stated that this evidence was also insufficient to establish the petitioner's ability to pay the proffered wage of \$53,000 as of the date of filing. The director also referred to the petitioner's claim that his \$53,000 equity in his home could have been used to pay the proffered wage. The director stated that using home equity to pay the proffered wage was at best a temporary way to establish an ability to pay the proffered wage. The director also referred to the petitioner's contention that depreciation should be considered when determining the petitioner's ability to pay the proffered wage. The director stated that if the Schedule L balance sheet did not indicate the availability of sufficient net current assets to meet the wage, then depreciation or amortization expense cannot be considered a "non-cash" expense available to pay the proffered wage. Finally the director noted that although the petitioner claimed to have paid the beneficiary in 2002, no evidentiary documentation supporting this claim had been submitted to the record.

On appeal, current counsel of record submitted a motion to reopen dated February 12, 2004 to the director. In his brief, counsel stated that the petitioner from 2001 to 2002 had an uncharacteristically unprofitable and difficult two years. Counsel stated that prior to this time period, the petitioner had been in operation with a stable gross annual income for nearly twenty years. Counsel also stated that due to the relocation of the business and unexpected need for extensive renovations, the store was closed for the first six months of 2001 and the business was out of operation. Counsel also stated that in 2002, the business made additional renovations and improvements, such as the replacement of an awning frame, construction costs and materials, electrical and plumbing improvements, installation of a heating and cooling systems, signs, window replacements and paint. These renovations in 2001 and 2002 totaled over \$23,000.

Counsel asserted that as the store was not in operation for half of 2001, the petitioner was only able to pay the beneficiary a salary of \$15,600 for 2001, and that in 2002 the beneficiary received a salary of \$31,200. Counsel also stated that in 2003, the beneficiary received the proffered wage. Counsel submitted Forms 1099-Misc for the beneficiary for tax years 2002 and 2003.

Counsel stated that even though the beneficiary did not receive the proffered wage in 2001 and 2002, the petitioner, as sole proprietor, could have utilized a portion of the \$53,000 of equity in his personal residence to pay the beneficiary's salary. Counsel then stated that with the business renovations and relocation accomplished, the petitioner experienced an increase in growth and profits in 2003 as expected, and the beneficiary was paid \$53,000 for the year as a sub-contractor and was issued a Form 1099-MISC. Counsel also submitted a copy of the beneficiary's Form 1040 for 2002. Counsel stated that the addition of the beneficiary to the petitioner's employees allowed the store to increase the quality of their produce and to save substantial costs. Counsel stated that prior to the addition of the beneficiary, the petitioner was forced to rely on local distributors that charged higher prices for their produce. The beneficiary was able to locate alternate distributors who sold produce at reduced costs in the larger Boston area markets.

Counsel cited precedent case law from the Department of Labor that examined sole proprietorships, namely *Ranchito Coletero*, 2002-INS-105 (BALCA Jan. 8, 2004) (en banc). He also cited to *O'Connor V. Attorney General of the United States* 1987 WL 18243 Civ. A. No. 87-0434-Z (September 29, 1987), and *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also cited to *Masonry Masters, Inc. V. Thornburgh*, 277 U.S. App. D.C. 341, 875 F. 2d 898 (1989) as further evidence that the petitioner's ability to pay the proffered wage may not be based simply upon whether the balance sheets or financial statements indicate that the petitioner's gross income less expenses leaves sufficient net profit to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. As indicated by the ETA Form 750, the petitioner employed the beneficiary as of May 2001. It is noted that the beneficiary in Form G-325A, Biographic Information, signed by the beneficiary in 2003, and submitted as part of the beneficiary's Form I-485, presents conflicting information with regard to any claimed employment with the petitioner in 2001. Form G-325A indicates that the beneficiary began working for the petitioner in January 2002, and that he also worked from March 2001 to April 2002 for Golden Pizza, in Springfield, Massachusetts. Although current counsel on appeal states that the petitioner paid the beneficiary \$15,600 in 2001, the petitioner did not submit any further evidentiary documentation, such as a W-2 Form or Form 1099-MISC, to further substantiate this assertion. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, *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." Therefore the petitioner has not established that it paid the beneficiary any wages in 2001.

The petitioner submitted Forms 1099-MISC that established it paid the beneficiary \$31,200 in 2002, and \$53,000 in 2003. While the documentation submitted establishes that the petitioner paid the beneficiary the proffered wage in 2003, it does not establish that as of the 2001 priority date in 2001 and throughout 2002, the

petitioner paid the beneficiary a salary equal to or greater than the proffered wage. Therefore the petitioner cannot establish that it is capable of paying the proffered wage as of the priority date based on the beneficiary's past wages.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports himself, his wife, and two daughters. As previously stated, the petitioner's adjusted gross income in 2001 is \$17,717 and in 2002 is \$33,660. The petitioner submitted a list of itemized expenses that totaled \$1,310 a month, or \$15,720 annually in 2001. In 2002, the petitioner's household expenses were \$1,460 a month, or \$17,520 yearly. It is noted that the petitioner's receipts and bills contained the sales agreement for a truck and that the monthly payments of \$285.60 began in September 2002. This additional expense does not appear to be reflected in the petitioner's Schedule C as a business expense or as a personal household expense on the petitioner's list of monthly expenses. Nevertheless, as a sole proprietorship, the petitioner would have had an additional monthly expense from September to December 2002 that totaled \$1,142.40. Therefore the petitioner's yearly expenses for 2002 may actually be \$18,662.40.

In 2001, the sole proprietorship's adjusted gross income of \$17,717, minus the sole proprietorship's yearly expenses of \$15,720, would leave \$1,997 with which to pay the proffered wage of \$53,000.¹ The petitioner

¹ As noted previously, the beneficiary provided conflicting testimony with regard to his 2001 employment and the petitioner did not provide any evidentiary documentation of the beneficiary's claimed salary of

would have to have \$51,003 in additional funds available to pay the proffered wage in 2001. In 2002, the sole proprietorship's adjusted gross income of \$33,660, minus the sole proprietor's yearly expenses of \$18,662.40, equals \$14,997.60. This sum is not sufficient to pay \$21,800, the difference between the beneficiary's 2002 actual wages of \$31,200 and the proffered wage of \$53,000. Thus, the petitioner has not established that it can pay the proffered wage, cover his existing business expenses, and sustain himself and his dependents, based on his adjusted gross income, in either 2001 or 2002.

With regard to former counsel's assertions concerning the addition of depreciation and other expenses such as elected mileage deductions to ascertain the petitioner's adjusted gross income, the AAO does not consider such items in its analysis of the petitioner's net income. 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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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. (Original emphasis.) *Chi-Feng* at 537.

In examining the totality of circumstances in the instant petition that would have affected the petitioner's ability to pay the proffered wage in 2001, it is noted that the documentation provided by the petitioner establishes that in July 2000, the petitioner sold his business property in Chicopee, Massachusetts. Furthermore, the record establishes the petitioner bought a new home in Springfield, Massachusetts in

\$15,600 in 2001. If the conflicting testimony were resolved and evidentiary documentation of any 2001 wages from the petitioner were provided, the petitioner would still need \$35,403 to pay the difference between the claimed wages and the proffered wage in 2001.

November 2000. The petitioner also provided documentation on renovations and expenditures for a new business location during May of 2001 and including apparent subsequent construction work in 2002. The petitioner also established that he received \$105,828.20 from the sale of his former business property, paid \$50,000 in cash with an additional mortgage of \$19,000 for his house in Springfield, and paid some \$23,521.39 in renovations of a new business location in Springfield, Massachusetts. In sum, the petitioner had additional assets in 2002 based on the sale of his business property, and the record suggests that he also spent a significant amount of these proceeds to purchase a new home, and make renovations on a new business property. The record also reflects that the petitioner paid off the residential mortgage in full by May 2002.

What the record does not reflect is whether the petitioner purchased his new business location, and what portion of the proceeds from the sale of his previous business location were used to purchase or lease the new property. Without such information, it is not possible to ascertain whether any of the proceeds from the petitioner's sale of his Chicopee business property would be available to pay the difference between the beneficiary's actual wages in 2001 and the proffered wage. If the petitioner could establish actual payment of wages to the beneficiary in that year as claimed, as stated previously, this difference would be \$35,403. Without more persuasive evidence, the petitioner has not established that any of the proceeds from the sale of the former business property could have been used to pay the difference between the beneficiary's actual wage and the proffered wage in 2001.

Former and current counsel both stated that the petitioner can use the equity he has in his personal residence as a source of additional funding, however, if counsels were referring to the petitioner using his residence to obtain a line of credit, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's or the sole proprietorship's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). In addition, employers do not typically liquidate or encumber their personal residences to pay employee wages.

On appeal, counsel refers to *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). This precedent decision relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In comparing the facts of *Sonegawa* with those of the petitioner, there are some parallel circumstances. The petitioner in the instant petition moved his business from one town to another, engaged in building renovations, and equipment purchases, and also bought a truck ostensibly it would appear to be used in its revised business operations. In addition, evidence in the record supports the inability to conduct business during 2000 and 2001 that would have reduced the petitioner's adjusted gross income in these years.

With regard to the issue of unprofitable years between profitable years as outlined in *Sonegawa*, the petitioner has not established that it had an uncharacteristically unprofitable year in 2001 in between profitable years. The record, as presently constituted, reflects no information as to the petitioner's business operations prior to the 2001 priority date. Therefore, it is not possible to judge whether the petitioner's 2001 business volume and operations were significantly less than the preceding year. Nevertheless, the petitioner should not be penalized for not having the episodically unprofitable business track record noted in *Sonegawa*. In fact, the record reflects considerable growth in the petitioner's business operations from 2001 to 2002 in the midst of changes in the petitioner's business location, physical infrastructure and business strategy. The petitioner's Schedule C for the tax year 2001 indicates the petitioner has gross sales/receipts of \$210,780, with line 26 reflecting no wages paid, and line 28 reflecting total expenses of \$28,744.² The petitioner's Schedule C for tax year 2002 indicates the petitioner had gross sales/receipts of \$650,696, with line 26 reflecting \$11,040 paid, and Line 39, Part III, page 2, reflecting other costs of \$31,200.³ The petitioner's total expenses for this year were \$77,260.

In sum, the petitioner's business operations, as reflected in gross receipts, despite the closing of one business site, the opening of another site, and the necessary renovations to the second site, increased 300 percent from 2001 to the year 2002. The petitioner's adjusted gross income also doubled between the two years examined in these proceedings. Within the context of small business operations, and assessing the totality of circumstances in this individual case, the petitioner's business operations from 2001 to 2002 suggest that the petitioner is a viable business concern. Nevertheless, the petitioner has not provided evidence that would resolve the issues addressed in this decision as to the petitioner's business profitability prior to 2001, any wages paid by the petitioner to the beneficiary in 2001, or the availability of funds from the sale of the petitioner's building in Chicopee, Massachusetts to pay the difference between actual wages paid and the proffered wage, or the entire proffered wage. With no evidence, the petitioner has not established its ability to pay the proffered wage as of April 26, 2001 and continuing through 2002. In any future proceedings in this matter, the petitioner should address these issues.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met not meet that burden. The director's decision shall stand, the appeal will be dismissed, and the petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.

² Line 39, Part III, page 2 of the petitioner's 2001 tax return also does not reflect other costs in that year, such as the use of contracted employees paid by Forms 1099-MISC.

³ On appeal, the petitioner submitted the beneficiary's Form 1099-MISC for the same sum of \$31,200 and stated that the beneficiary had been paid as a contractor for his work in 2002.