

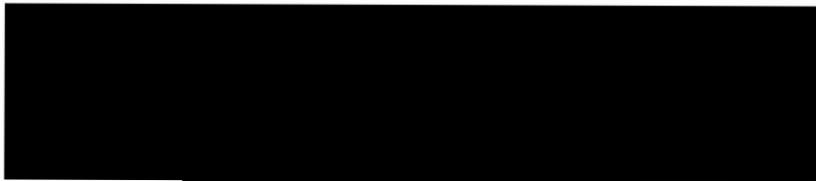


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and Immigration  
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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 10 2006  
SRC 03 092 55206

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, on January 29, 2004, initially approved the employment-based preference visa petition. The director subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on September 20, 2004, based on the petitioner's inability to pay the proffered wages of two beneficiaries of I-140 petitions submitted simultaneously to the Service Center. In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). 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 is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petitioner's Form I-140 was approved on January 29, 2004. An application for lawful permanent residence (Form I-485) in connection with the approved Form I-140 was pending at the time the director issued the NOIR.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is an annual salary of \$39,200. The beneficiary claimed to have worked for the petitioner since January 1997.

On September 20, 2004, in his notice of intent to revoke the petition, the director stated that further information contained in other immigrant visa petitions filed by the petitioner, demonstrated that the beneficiary and/or the petitioner, did not qualify for the benefits obtained by the prior approval of the petition.

The director noted that the petitioner had filed three I-140 petitions and stated that the petitioner had to establish its ability to pay the proffered wage of all beneficiaries when it petitions for multiple immigrant workers. The director then noted that one of the three petitions had been initially denied based on the inability of the petitioner to pay the proffered wages of all three beneficiaries. The director identified the other beneficiary of the petitioner's remaining I-140 petition as [REDACTED], the brother of the beneficiary in the instant petition. The director noted that both beneficiaries' G-325A forms listed identical mothers and fathers, with identical birth dates and places of residences. The director then stated the salaries identified on the ETA 750 for both beneficiaries indicated that the petitioner had to establish its ability to pay combined proffered wages of \$55,549. The director stated that the petitioner had to establish its ability to pay the combined proffered wage and should submit evidence in the form of federal income tax returns, audited financial statements, or annual reports.

In addition the director stated that the petitioner did not provide the original ETA 750 labor certification for the beneficiary, but rather a photocopy of the document. The director noted that neither I-140 petition contained the original labor certification. The director requested that the petitioner submit an original, individual, and unused labor certification for the beneficiary.

In response to the NOIR, counsel submitted the original ETA 750 labor certification and stated that it appeared the petitioner was sent the original ETA 750 document and that counsel received the duplicate form. Counsel stated that he thought the duplicate was the original because the attorney of record generally received the original document.

With regard to the petitioner's ability to pay the proffered wage, counsel submitted the petitioner's IRS Form 1120S, the petitioner's corporate tax returns for the years 1998 to 2002, as well as a copy of the IRS extension request for the petitioner's 2003 federal tax forms. Counsel stated that courts have stated that an employer's entire financial resources must be analyzed in order to make an assessment of the petitioner's ability to pay the proffered wage and cited *O'Connor V. Attorney General*, 1987 WL 18243(D. Mass). Counsel also cited *Ohsawa America* 88-INA-240 (9 August 20, 1988) a Board of Appeals for Labor Certification Appeals (BALCA). Counsel stated that in this decision a petitioner's explanation of its ongoing progress toward increased profitability and its logical explanation of whether it had done and is doing to maintain profitability were given weight in considering the petitioner's ability to pay the proffered wage. Counsel stated that the petitioner sought to pay the beneficiary a salary of \$16,348 per year, which was \$1,362.33 a month. Counsel also stated that if the beneficiary's brother's petition that was pending was included in the analysis of the petitioner's ability to pay the proffered wage, the petitioner had to have an additional \$39,200 a year or \$3,266.67. Counsel noted that the petitioner's cash flow, assets, and average ledger balances in its bank statements all were indicators that supported the petitioner's ability to pay the proffered wages. Counsel identified the petitioner's net income in the years 1998 to 2002 as follows: -\$18,572, -\$65,143,<sup>1</sup> \$27,858, \$23,649, and \$48,267. Counsel identified the petitioner's cash flow which counsel identified as taxable income plus depreciation for the years 1998 to 2002 as follows: -\$17,724, -\$21,825, \$31,453, \$27,444, and

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<sup>1</sup> It is not clear why counsel used this figure. The petitioner's 1999 federal income tax return indicates ordinary income of -\$24,931.

\$101,942. Counsel identified the petitioner's assets from the years 1998 to 2002 as \$257,516, \$717,793, \$868,094, \$760,695, and \$832,079.

Counsel also submitted the first pages of petitioner's bank statements from League City Bank and Trust for the year 1998 and from First Community Bank for the year 1999. Counsel stated that in 1998, the petitioner maintained an average ledger balance of \$9,803.16, while in 1999, the petitioner maintained a monthly average closing balance of \$51,810.06. Counsel then submitted bank statements from First Community Bank, N.A., for four months in 2000, 2001, 2002, and 2003. Counsel stated that the petitioner maintained balances of \$27,665.11, \$27,522.14, \$11,232.71, and \$40,302.42 for the years 2000 to 2003. Counsel stated that such balances represented money that was reserved or unforeseeable expenses and events such as salaries, and purchase costs. Counsel also stated that the monthly statement established that the petitioner had necessary cash reserve to pay the proffered wage.

Counsel also submitted the beneficiary's W-2 Form for 2003. This document indicated the beneficiary earned \$13,066 in 2003. Counsel stated that these were wages earned after the beneficiary received employment authorization. Counsel also stated that the petitioner has shown consistent financial improvement and a pattern of increased financial results. Counsel cited *Matter of Sonogawa* 12 I&N Dec. 612 (BIA 1967), and stated that in this decision, the court utilized factors such as petitioner's expectations of continued increase in business and increasing profits in its decision that the petitioner was indeed able to pay the proffered wage.

In the notice of revocation, dated October 22, 2004, the director stated that the petitioner had filed I-140 petitions for both the beneficiary and his brother. The director stated that the petitioner had to establish its ability to pay the beneficiary's proffered wage of \$16,348.80 and the brother's proffered salary of \$39,200, or \$55,548 as of the 1998 priority date. The director then noted that the petitioner, in tax year 1998, had an annual gross income of \$5,969 and that after expenses, which included wages and benefits the petitioner had a net income of -\$18,572. The director then identified the petitioner's assets, excluding the sale price of liquidation locked up in building or land, as \$143,471, while the petitioner's liabilities, excluding liabilities paid out in more than one year, was \$112,813.<sup>2</sup> The director then stated that the petitioner's remaining assets left after the petitioner's liabilities were deducted was \$30,000.<sup>3</sup> The director stated that the petitioner must establish a bottom line of assets over liabilities sufficient to pay the proffered wage.<sup>4</sup> The director then noted that the petitioner had not established the ability to pay the proffered wages to the beneficiaries as of the 1998 priority date<sup>5</sup> and continuing until the beneficiary(ies) obtained lawful permanent residence.

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<sup>2</sup> The AAO does not analyze petitioner's assets and liabilities in the manner utilized in the director's decision. The analysis of the petitioner's current net assets will be discussed further in these proceedings.

<sup>3</sup> The AAO will examine the petitioner's current assets, current liabilities and net current assets further in this decision. It is noted that the actual difference between the two figures used by the director is \$30,659.

<sup>4</sup> Although the director did not explicitly state this in his decision, the petitioner's remaining assets, as identified by the director at \$30,000, are not sufficient to pay the proffered combined wages of both the beneficiary and his brother, namely, \$55,548.80.

<sup>5</sup> The director noted that both beneficiaries had the same 1998 priority date, as indicated by their Forms ETA 750.

On appeal, counsel states that the director's denial of the instant petition was an egregious error. Counsel stated that the director penalized the petitioner by revoking the previously approved I-140 for paying him only \$13,0766.72 in 2003, and that CIS did not grant employment authorization until July 28, 2003. Counsel states that the beneficiary was only able to work legally for four months in 2003. Counsel also stated that the amount paid to the beneficiary in these four months is commensurate with working for four months at a yearly salary of \$16,348. Counsel further notes that since the petitioner was paying the proffered wage, the petitioner has established its ability to pay the proffered wage.

Counsel reiterates his comments with regard to the petitioner's tax return, net income, cash flow, assets, and bank statements for the years 1998 to 2003. Counsel states that even if the beneficiary's brother's monthly salary of \$1,362 were combined with the beneficiary's monthly salary of \$3,266.67, the petitioner would still have sufficient resources to pay the proffered wages.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, statements for the years bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2), namely federal income tax returns, annual reports or audited financial statements, is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Moreover, the petitioner only submitted first pages of monthly statements for the years 1998 and 1999, and only statements for four months in each of the years 2000 to 2003. Even if the bank statements were to be considered as evidence, the record is not complete.

With regard to the use of cash flow, assets, or net income to determine a petitioner's ability to pay the proffered wage, the AAO does examine the net income of petitioners, however, gross assets and cash flow are not viewed as sufficient factors to evaluate the petitioner's ability to pay a proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *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).

In his response to the director's NOIR, counsel stated that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel stated that in this decision a petitioner's explanation of its ongoing progress toward increased profitability and its logical explanation of whether it had done and is doing to maintain profitability. Counsel does not state how DOL precedent is binding in these proceedings. Nor does counsel submit how CIS's regulatory authority to verify the petitioner's ability to pay the proffered wage is obviated by DOL. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity, besides showing increased revenue and decreased operating losses, also established one of its shareholder's willingness and ability to fund the company. In the instant petition, the petitioner provided no further explanation of any shareholder willingness to fund the petitioner or explanation of progress toward increased profitability other than an examination of items such as cash flow, and gross receipts. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition. Counsel in his response to the director's NOID also cited *O'Conner V. Attorney General*, 1987 WL 18243 (Mass.) Counsel cited this case to further support counsel's statement that courts have adopted a "totality" approach in determining whether an petitioner has sufficiently established its ability to pay a proffered wage. However, it is noted that the CIS is not bound to the decisions of district courts, and that the Massachusetts decision would not be binding on the instant petition. Moreover, the petitioner in *O'Conner* was a sole proprietor. Unlike an S corporation, such as the proprietor, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services 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. Although the petitioner submitted W-2 salary statements for the beneficiary for the year 2003, the petitioner did not establish that the salary identified on the form was for only four months of the year. Counsel's or the petitioner's assertions 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). Furthermore, the petitioner did not provide any further documentary evidence that it employed the beneficiary as of the 1998 priority date, and that it paid him the proffered wage as of that date. The petitioner would have to submit some evidentiary documentation, such as Forms 1099-MISC, pay slips, or paychecks, to further substantiate any such assertions. The petitioner cannot establish its ability to pay the proffered wage as of the 1998 priority date, based only on the evidence of wages paid to the beneficiary in 2003. Therefore the petitioner did not establish its ability to pay the proffered wage based on its employment of the beneficiary and its payment of a salary either equal or greater than the proffered wage. It is also noted that the petitioner, as stated by the director, would have had to establish its ability to pay the proffered wages of all beneficiaries whose petitions were submitted at the same time as the instant petition. With regard to the employment of the beneficiary and his brother, the combined wages would have been \$54,880.80. The petitioner submitted no documentary evidence to establish it paid such combined wages as of 1998 to the present.

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. Contrary to counsel's assertions, CIS does not rely on the gross receipts, cash flow, or total income of petitioners to establish the ability to pay the proffered wage. 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). 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As previously stated, the petitioner's net income for the years 1998 to 2002 are as follows: -\$18,572, -\$24,931, \$27,858, \$23,649, and \$48,267. As noted previously, the petitioner has to establish its ability to pay the proffered wage of all beneficiaries for whom I-140 petitions were submitted. For tax years 1998 to 2002, the petitioner had insufficient net income to pay the combined wages of him and his brother, namely, \$55,548.80. Therefore the petitioner's net income cannot be used to establish the ability to pay the combined wages.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner submitted the following information for tax years 1998 to 2002:

	1998	1999	2000
Ordinary Income	\$ -18,572	\$ -24,931	\$ 27,858
Current Assets	\$ 3,201	\$ 8,683	\$ 33,848
Current Liabilities	\$ 40,093	\$ 75,534	\$ 44,871
Net current assets	\$ -36,892	\$ -66,851	\$ -11,023

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

	2001	2002
Ordinary Income	\$ 23,649	\$ 48,267
Current Assets	\$ 34,670	\$ 420
Current Liabilities	\$ 90,159	\$ 112,172
Net current assets	\$ -55,489	\$ -111,752

These figures fail to establish the ability of the petitioner to pay the proffered wage.

In examining the petitioner's net current assets, the AAO will examine whether the petitioner had the ability to pay the entire proffered salary to both the beneficiary and his brother, as opposed to the difference between proffered wages and actual wages. In 1998, the petitioner shows a net income of -\$18,572, and net current assets of -\$36,892, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In 1999, the petitioner shows a net income of -\$24,931, and net current assets of -\$66,851, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In 2000, the petitioner shows a net income of \$27,858 and net current assets of -\$11,023, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In 2001, the petitioner shows a net income of \$23,649, and net current assets of -\$55,489, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings. In 2002, the petitioner shows a net income of \$48,267, and net current assets of -\$111,752, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In tax year 2003, the petitioner established that it paid the beneficiary \$5,549.36. However, the record contains no further evidence to further examine whether the petitioner had sufficient net income or net current assets to pay the difference between the beneficiary's proffered wage and his actual salary. As stated previously, the petitioner provided no evidence as to any wages paid to the beneficiary's brother, for the years 1998 to 2002 to examine whether the petitioner has the ability to pay any differences between proffered wages and actual wages in these years.

In addition, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 1998 priority date and continuing to the present.

Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in its response to the director's NOID. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss

Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner. In terms of net current assets, all the tax years documented in the record have been unprofitable. Although counsel stated in its response to the NOID that the petitioner has shown a pattern of increased profits, the record reflects a pattern of increased gross receipts up to tax year 2001, with a decrease of gross profits in 2002. The record also reflects a pattern of negative net current assets from 1998 to 2002, with tax year 2000 showing the least amount of negative net current assets. Thus, the findings in *Sonegawa* would not be viewed as analogous to the findings in the instant petition.

As stated previously, 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The director's revocation of the petition shall stand.