

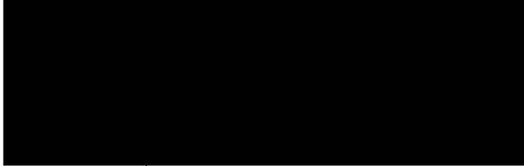
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Services

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FILE: LIN 06 059 52884 Office: NEBRASKA SERVICE CENTER Date: DEC 03 2007

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel general manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition based on its corporate tax returns, the assets of the petitioner's owner or the petitioner's bank statements. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely 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.

As set forth in the director's August 2, 2006 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. 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 Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$30,056 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, counsel submits a brief and the following evidence:

A letter dated August 25, 2006 written by [REDACTED], Iselin, New Jersey. In his letter, [REDACTED] states that the petitioner's property is worth about three million dollars and that the personal income of the petitioner's owner, [REDACTED] for tax year 2005 was \$96,746. [REDACTED] identifies the petitioner's net assets for tax years 2003, 2004 and 2005 as \$618,521, \$603,501, and \$610,908, respectively. [REDACTED] states that the petitioner has no outside loans on its assets and has enough cash flow to pay the proffered wage.

An undated sworn affidavit from [REDACTED] the petitioner's owner. [REDACTED] states that the petitioner was damaged due to a fire on May 26, 2001 and started functioning again in October 2005. [REDACTED] states that the petitioner's tax return for 2005 shows a net profit of \$35,238, and that the petitioner's profit will increase in tax year 2006, as the motel receives full capacity with all rooms functional. [REDACTED] submits copies of his Forms 1040, U.S. Individual Income Tax Return, for tax years 2002 to 2005. [REDACTED] stated he and his wife are the only shareholders of the petitioner, and that he can bring capital from his personal income to cover any shortfalls in the petitioner's net income to pay the proffered wage. [REDACTED] finally states that the fire sustained by the petitioner was not the beneficiary's fault.

Copies of the petitioner's owner's personal income tax returns for tax years 2001 to 2005:²

Copy of the check in the amount of \$437,275 dated February 7, 2002 that was paid to the petitioner by Indiana Insurance Company; and

Copies of share certificates for the petitioner, identifying [REDACTED] and [REDACTED] as shareholders.

Counsel also resubmits a letter dated February 7, 2002 from Indiana Insurance Company, signed by [REDACTED] Property Specialist, that examines the insurance claim provisions. The record also contains the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for tax years 2001 to 2005; a copy of [REDACTED] Bank of America checking account that indicates an ending balance of [REDACTED] for October 2005; an earlier letter dated June 29, 2001, from [REDACTED] Indiana Insurance Company; an earlier letter from [REDACTED] the petitioner's accountant, dated March 17, 2006 that notes the petitioner's profits for tax year 2005 and projected profits for tax year 2006; and finally, a copy of Form 941, Employer's Quarterly Tax Return for the first quarter of 2006 indicating the petitioner paid wages of \$18,700. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² These tax returns identify [REDACTED] as being single.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on October 10, 2000, to have a gross annual income of \$500,000, and to currently employ twelve workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner, although incorporated, is run like a family business, and that [REDACTED] his wife and son are the only shareholders. Counsel asserts that [REDACTED] owns 70 percent of the petitioner's assets. Counsel notes that on May 26, 2001, the petitioner was damaged due to fire, and based on the fire damage, the petitioner was not in business from 2001 to 2004. Counsel then asserts that the petitioner began business operations in October 2005 and expects to operate at full capacity in 2006.

Counsel then states that by examining the overall fiscal circumstances of the petitioner, the petitioner has the ability to pay the proffered wage based on the current corporate financial situation of the petitioner, and the personal financial assets of [REDACTED], the petitioner's owner. Counsel cites [REDACTED] INA-105 Board of Alien Labor Certification Appeals, (BALCA Jan. 8, 2004) for the proposition that although the accounting choices by the petitioner may lead to financial losses, the business entity may still have ample funds for the payment of proffered wages. Counsel in citing [REDACTED] also refers to *Ohsawa America*, 88-INA-240, (BALCA Aug. 30, 1988). Counsel in citing *sawa America*, states that in this decision, the corporate employer showed losses and negative working capital as of the priority date but also showed increased sales and reduced operating losses. Counsel also notes that the sufficiency of the petitioner's funds in *Ohsawa America* was based on the high personal net worth of the major shareholders who had shown their willingness to fund the company.

Counsel then examines [REDACTED] adjusted gross income for tax years 2001 to 2005, and notes that [REDACTED] in his affidavit also asserts that he is willing to fund the petitioner out of his personal income.

Counsel states that the instant beneficiary after showing losses and negative income immediately following the April 2001 priority date until 2004 has increased its business since 2004. Counsel notes that in 2004, only part of the motel was in operation, and that the petitioner is expected to operate at capacity level in tax year 2006. Based on *Ohsawa America* decision, counsel states that [REDACTED] personal income should be considered in examining the petitioner's ability to pay the proffered wage.

Counsel states that the petitioner's present financial situation should be considered a favorable factor in determining a petitioner's ability to pay the proffered wage. Counsel also notes that the petitioner's appraised value is [REDACTED] and he identifies the petitioner's net assets in tax years 2003, 2004, and 2004 as \$618,521, [REDACTED] and \$ [REDACTED] respectively. Counsel also asserts that the adjudicating officer should have calculated the petitioner's net income after excluding the petitioner's depreciation expense, which is a non-cash item. Counsel also states that the wages and compensation provided to [REDACTED] the petitioner's owner, for tax years 2001 to 2004 should also be considered in determining the petitioner's ability to pay the proffered wage. Counsel identifies the wages or compensation during these years as follows: tax year 2001, \$11,380 in officer compensation, and salary and wages of \$21,650; tax year 2002, no wages or compensation; tax year 2003, \$18,100 in salaries and wages; and tax year 2004, \$16,400 in salaries and wages.

Counsel then states that the insurance compensation provided to the petitioner following the fire damage in 2001 may be treated as corporate income.

In sum, counsel states that the petitioner's owner's personal income, as established by the BALCA decisions cited on appeal, the exclusion of depreciation expenses from the petitioner's calculated net income, the

payment of salary and wages and compensation by the petitioner to the petitioner's owners, and the insurance compensation received by the petitioner can all be used to establish that the petitioner had sufficient funds to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's assertion with regard to the assets of shareholders or owners being considered in these proceedings is not persuasive. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Thus, the petitioner's majority shareholder's assets as established through his individual tax returns cannot be considered as a source of additional funds with which to pay the proffered wage.

The AAO further notes that the record is inconsistent with regard to the actual number of shareholders, the identification of shareholders, and their percentage interest in the petitioner. The share certificates submitted on appeal only indicate that as of [REDACTED] owns 750 shares, while as of July 23, 2001, [REDACTED] owns 150 shares. The actual percentage interest owned by [REDACTED] is not indicated. Furthermore, the petitioner's income tax returns contain no further information on the actual shareholders' interest in the petitioner, and the income tax returns for [REDACTED] submitted to the record indicate that he is single. Thus, counsel's statement that the petitioner is owned by [REDACTED], his wife and his son is not supported by any relevant evidence. 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)).

Although counsel on appeal does not refer to the petitioner's owner's bank statement for October 2005 submitted to the record, the consideration of the petitioner's owner's bank account or the petitioner's bank account would also be misplaced. First, 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) 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 owner's bank statement have any relationship to or reflect additional available funds that were not reflected on the petitioner's tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The AAO also notes that counsel cites [REDACTED] of Alien Labor Certification Appeals, (BALCA Jan. 8, 2004) for the proposition that the petitioner may fail to show profits and still rely upon shareholder assets. Counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. 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, [REDACTED] deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation. Counsel also cites *Ohsawa America*, 88-INA-240, (BALCA Aug. 30, 1988), for the proposition that personal assets of the petitioner's owner are sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel also states that the instant petitioner has illustrated, as had the petitioner in *Ohsawa America*, that it had increased business operations in 2005, and would further increase revenue in tax year 2006. Again, counsel does not state how DOL precedent is binding in these proceedings. In the instant petition, the petitioner shows a complete break in business operations from tax year 2001 to 2005, minimal increases in total assets listed on page one of the petitioner's tax returns, and minimal wages or lack of officer compensation from the 2001 priority year date through tax year 2005. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Further on appeal, counsel asserts that the petitioner's cash flow should be considered an additional manner of establishing the petitioner's ability to pay the proffered wage. However, counsel provides no further regulatory or statutory authority that such an analysis would be warranted in the consideration of a petitioner's ability to pay the proffered wage. As previously stated, 8 C.F.R. § 204.5(g)(2), required one of three types of evidence 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) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Counsel also asserts on appeal that the insurance payment received by the petitioner to cover repairs to the petitioner should be considered corporate income. First, counsel does not indicate how the petitioner accounted for the insurance payment on its tax returns or in its financial statements. Second, counsel provides no further evidentiary documentation to further substantiate his 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).

Finally, counsel states on appeal that the AAO should consider the petitioner's depreciation expenses when calculating the petitioner's ability to pay the proffered wage. The AAO, however, does not utilize this analysis in these proceedings. The issue of depreciation will be discussed more fully in the AAO's examination of the petitioner's net income for tax years 2001 to 2005.

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. In the

instant case, the petitioner has not established that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2005.

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, contrary to counsel's assertion, 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

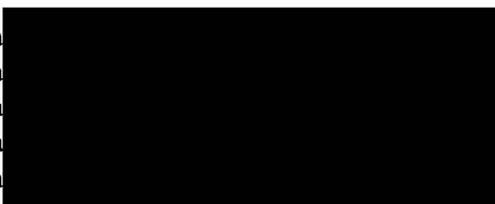
In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court 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 the 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.

(Emphasis in original.) *Chi-Feng Chang* at 537

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$30,056 per year from the priority date:

- In 2001, the Form 1120 stated a
- In 2002, the Form 1120 stated a
- In 2003, the Form 1120 stated a
- In 2004, the Form 1120 stated a
- In 2005, the Form 1120 stated a



Therefore, for the year 2005, the petitioner did have sufficient net income to pay the proffered wage. However, the petitioner did not have sufficient net income to pay the proffered wage as of the 2001 priority

³The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

date and through tax year 2004. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.⁴ 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.

- The petitioner's net current assets during 2001 were \$909.
- The petitioner's net current assets during 2002 were \$18,588.
- The petitioner's net current assets during 2003 were \$15,133.
- The petitioner's net current assets during 2004 were \$11,737.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2005.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel examines the petitioner's owner's personal assets, the petitioner's depreciation expenses, the insurance payment received by the petitioner in tax year 2002 as sources of additional funds with which to pay the proffered wage. As stated previously, the majority shareholder's assets, the insurance payment due to the petitioner's fire damage, and the petitioner's depreciation expenses are not considered in determining the petitioner's ability to pay the proffered wage.

As stated previously, the AAO can consider the overall circumstances of the petitioner pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This decision relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity

⁴According 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.

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 [REDACTED] 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.

The fact that the petitioner experienced a fire in the 2001 priority year which rendered the petitioner inoperative for three years is an unusual circumstance; however, the petitioner had only been in operation for a year at the time the fire occurred, and had no appreciable history of profitable business operations upon which to base an affirmative decision as to the petitioner's ability to reestablish its profitability in future years. Furthermore, the record does not reflect wage levels that are commensurate with the claimed number of employees as of the filing of the I-140 petition, at any point during the relevant period of time in question from the 2001 priority year and to the present. In addition, the petitioner provided no further evidence as to its reputation within the motel industry in Muncie, Indiana, that would more clearly establish the petitioner's expectations of future profits is reasonable. Thus, the petitioner's circumstances do not appear analogous to the circumstances of the petitioner in *Sonegawa*.⁵

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 Form ETA 750 was accepted for processing by the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

⁵ The AAO also notes that the Secretary of State for the state of Indiana's website for corporations in its Business Services Division indicates that the petitioner was administratively dissolved as of September 21, 2004. See <https://secure.in.gov/sos/bus-service/online-corps> available as of November 9, 2007.