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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 10 2008

EAC 05 209 53244

IN RE:

Petitioner:



Beneficiary:

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, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour for a 35-hour week, which equals \$34,379.80 per year.

The Form I-140 petition in this matter was submitted on July 18, 2005.<sup>1</sup> On the petition, the petitioner stated that it was established on October 1, 1976. The space provided for the petitioner to state the number of

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<sup>1</sup> The record contains two Form I-140 visa petitions filed by the same petitioner for the instant beneficiary. The previous petition was filed on February 8, 2003 and denied on April 13, 2004. A motion to reconsider was filed on May 4, 2004 and dismissed on July 13, 2004. A second motion to reconsider was filed August 16, 2004 and dismissed on September 20, 2004. Today's decision, however, concerns only the second visa petition, the procedural history of which is described in this decision.

workers it employs was left blank, as were the spaces provided for the petitioner to state its net annual income and its gross annual income. In response to a request for evidence dated October 12, 2005 the petitioner's prior attorney stated that the petitioner employs 35 workers, that its gross annual income is \$2,357,000, and that its net annual income is \$120,000.<sup>2</sup>

On the Form ETA 750, Part B, signed by the beneficiary on March 5, 2001, the beneficiary claimed to have worked for the petitioner since June 2000. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in New York City.

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 evidence properly in the record including evidence properly submitted on appeal.<sup>3</sup> In the instant case the record contains (1) the petitioner's 2000, 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) 2001, 2002, 2003, 2004, and 2005 Form W-2 Wage and Tax Statements, (3) a letter dated September 14, 2006 from E [REDACTED] stating that he is the petitioner's sole shareholder, (4) portions of [REDACTED] Form 1040 U.S. Individual Income Tax Returns for various years, including Schedules E showing real estate holdings and income, and (5) an operating agreement and other documents pertinent to a real estate holding company of which [REDACTED] is majority owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on October 1, 1976, and that it reports taxes pursuant to accrual convention accounting and a fiscal year running from October 1 of the nominal year to September 30 of the following year.

During its 2000 fiscal year, which ran from October 1, 2000 to September 30, 2001, the petitioner declared Schedule K, Line 23, Income<sup>4</sup> of \$16,285. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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<sup>2</sup> The income tax returns subsequently provided do not support the assertion that the petitioner ever had that amount of net annual income.

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>4</sup> The Schedule K Line 23, Income of a subchapter S corporation or other entity reporting on the Form 1120S, U.S. Income Tax Return for an S Corporation is the sum of the various types of its income and gain (Ordinary income, Long-term Capital Gain, Short-term Capital Gain, *et cetera*) minus the various types of loss (Ordinary loss, Long-term Capital Loss, Short-term Capital Loss, *et cetera*) and is considered to be net income for the purpose of assessing the petitioner's ability to pay the proffered wage.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner declared a loss of \$13,935 as its Schedule K, Line 23, Income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner declared Schedule K, Line 23, Income of \$11,239. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2003 fiscal year, which ran from October 1, 2003 to September 30, 2004, the petitioner declared Schedule K, Line 23, Income of \$33,174. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2004 fiscal year, which ran from October 1, 2004 to September 30, 2005, the petitioner declared Schedule K, Line 17e, Income/loss reconciliation<sup>5</sup> of \$52,017. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001, 2002, 2003, 2004, and 2005 W-2 forms provided show that the petitioner paid the beneficiary wages of \$9,018.99, \$18,933, \$20,367.28, \$26,381.42, and \$28,621.42 during those years, respectively.

The director denied the petition on August 31, 2006.

On appeal, counsel cited the petitioner's gross receipts, its current assets, its "deductions," its owner's assets, and the wages it paid to the beneficiary during the various years, as indices of its continuing ability to pay the proffered wage beginning on the priority date. Counsel cited non-precedent decisions of this office for various propositions.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the totality of the circumstances of the case should be considered in assessing the petitioner's ability to pay the proffered wage. Counsel also appeared to cite that case for the proposition that the assets of the petitioner's owner should be considered.

Counsel's citation of unpublished, non-precedent AAO decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that Citizenship and Immigration Services (CIS) precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Counsel has provided evidence pertinent to the personal finances of the petitioner's owner and indicated that his finances should be considered in analyzing the petitioner's continuing ability to pay the proffered wage

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<sup>5</sup> The Schedule K was amended such that what had been designated Line 23 Income is now called Line 17e Income/loss reconciliation. For the years after that amendment, Line 17e Income/loss reconciliation is considered net income.

beginning on the priority date. Counsel appears to have cited *Matter of Sonogawa*, 12 I&N Dec. 612, for that proposition.

Although *Matter of Sonogawa* states that the totality of circumstances should be considered, this office finds that the decision intended only relevant circumstances to be considered. The relevance, or irrelevance, of the petitioner's owner's assets to the petitioner's continuing ability to pay the proffered wage beginning on the priority date shall therefore be discussed.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>6</sup> or otherwise increased its net income,<sup>7</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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 CIS should have considered income before expenses were paid rather than net income.

Counsel has asserted that the petitioner's "deductions" are an index of its ability to pay the proffered wage. Although counsel did not elaborate, this office believes that he was urging that depreciation, and possibly amortization, deductions show ability to pay some or all of the proffered wage as they do not correspond to actual cash expenditures in the year taken. This office will address counsel's argument based on the assumption that this was counsel's intended implication. If counsel meant to imply that some other

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<sup>6</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>7</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

deductions were relevant to the petitioner's ability to pay the proffered wage, counsel may make that argument more explicitly on motion.

Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient to the petitioner's present purpose.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.<sup>8</sup> Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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, 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).

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<sup>8</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary wages of \$9,018.99 during 2001, \$18,933 during 2002, \$20,367.28 during 2003, \$26,381.42 during 2004, and \$28,621.42 during 2005. The petitioner must show the ability to pay the remaining balance of the wages proffered.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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); *Ubada v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>9</sup> shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$34,379.80 per year. The priority date is April 9, 2001, which fell within the petitioner's 2000 fiscal year.

The analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date is complicated by the fact that wages are reported on W-2 forms pursuant to the calendar year, whereas the petitioner reports taxes pursuant to a fiscal year. Of the \$9,018.99 in wages that the petitioner paid the beneficiary during 2001, for instance, approximately three-quarters, or \$6,764.24, was for work during the

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<sup>9</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

petitioner's 2000 fiscal year, and only approximately one-quarter, or \$2,254.75 was for work during the petitioner's 2001 fiscal year. The 2001 W-2 form demonstrates, therefore, the ability to pay those portions of the proffered wage during those fiscal years.

During its 2000 fiscal year, then, the petitioner has demonstrated the ability to pay the beneficiary \$6,764.24 in wages and it is obliged to show the ability to pay the remaining \$27,615.56 balance of the proffered wage<sup>10</sup> during that fiscal year. The petitioner declared income of \$16,285 during its 2000 fiscal year. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner submitted no reliable evidence of any other funds at its disposal during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

As discussed above, the 2001 W-2 form shows the petitioner paid the beneficiary wages of \$2,254.75 during its 2001 fiscal year. The 2002 W-2 form shows that the petitioner paid the beneficiary \$14,199.75<sup>11</sup> during that year, for a total of \$16,454.50.<sup>12</sup> The petitioner is obliged to show the ability to pay the remaining \$17,925.30 balance of the proffered wage<sup>13</sup> during that fiscal year.

During its 2001 fiscal year, however, the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that fiscal year. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

The 2002 W-2 form shows that the petitioner paid the beneficiary approximately \$4,733.25 during its 2002 fiscal year.<sup>14</sup> The 2003 W-2 form shows that the petitioner paid the beneficiary approximately \$15,275.46 during that fiscal year,<sup>15</sup> for a total of \$20,008.71<sup>16</sup> during that fiscal year. The petitioner must show the ability to pay the remaining \$14,371.09 balance of the proffered wage<sup>17</sup> during that fiscal year.

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<sup>10</sup> \$34,379.80 - \$6,764.24

<sup>11</sup> \$18,933 x  $\frac{3}{4}$

<sup>12</sup> \$2,254.75 + \$14,199.75

<sup>13</sup> \$34,379.80 - \$16,454.50

<sup>14</sup> \$18,933 x  $\frac{1}{4}$ .

<sup>15</sup> \$20,367.28 x  $\frac{3}{4}$

<sup>16</sup> \$4,733.25 + \$15,275.46

During its 2002 fiscal year, however, the petitioner declared income of \$11,239. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner submitted no reliable evidence of any other funds at its disposal during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

The 2003 W-2 form shows that the petitioner paid the beneficiary approximately \$5,091.82 during its 2003 fiscal year.<sup>18</sup> The 2004 W-2 form shows that the petitioner paid the beneficiary approximately \$19,786.07 during that same fiscal year,<sup>19</sup> for a total of \$24,877.99<sup>20</sup>. The petitioner is obliged to show the ability to pay the remaining \$9,501.81 balance of the proffered wage<sup>21</sup> during that fiscal year. During that fiscal year the petitioner declared income of \$33,174. That amount is greater than the remaining balance of the proffered wage. The petitioner has shown the ability to pay the proffered wage during its 2003 fiscal year.

The 2004 W-2 form shows that the petitioner paid the beneficiary approximately \$6,595.36 during its 2004 fiscal year.<sup>22</sup> The 2005 W-2 form shows that the petitioner paid the beneficiary approximately \$21,466.07 during that fiscal year,<sup>23</sup> for a total of \$28,061.43.<sup>24</sup> The petitioner is obliged to show the ability to pay the remaining \$6,318.37 balance of the proffered wage<sup>25</sup> during that fiscal year. During that fiscal year the petitioner declared income of \$52,017. That amount is greater than the remaining balance of the proffered wage. The petitioner has shown the ability to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on July 18, 2005. On that date the petitioner's fiscal year 2005 had not begun, and its 2005 tax return was unavailable. That tax return was never subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during its 2005 fiscal year and later fiscal years.

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<sup>17</sup> \$34,379.80 - \$20,008.71

<sup>18</sup> \$20,367.28 x ¼

<sup>19</sup> \$26,381.42 x ¾

<sup>20</sup> \$5091.82 + \$19,786.07

<sup>21</sup> \$34,379.80 - \$24,877.99

<sup>22</sup> \$26,381.42 x ¼

<sup>23</sup> \$28,621.42 x ¾

<sup>24</sup> \$6,595.36 + 21,466.07

<sup>25</sup> \$34,379.80 - \$28,061.43

Counsel asserted that notwithstanding the poor performance evidenced by some of the petitioner's income tax returns, however, the instant petition should be approved, consistent with the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), based on the totality of circumstances in this case.

Counsel is correct that *Matter of Sonegawa* stands for the proposition that a petition need not necessarily be denied because one isolated years tax return, or possibly even the returns of a few isolated years, does not or do not demonstrate that the petitioner was able to pay the proffered wage. Denial would not be appropriate if the totality of circumstances in the case showed that the petitioner was able to pay the proffered wage.

*Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that it has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2000, 2001, and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2000, 2001, and 2002 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

Another issue exists in the instant case that was not addressed in the decision of denial. A website maintained by the New York Department of State Division of Corporations at [http://appsex8.dos.state.ny.us/corp\\_public/corpsearch.entity\\_search\\_entry](http://appsex8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry) (Accessed February 25, 2008) indicates that the instant petitioner's corporate status is "inactive." If the petitioner in this case no longer exists as an active business entity, then it is unable to employ the beneficiary. The petition should have been denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each reason considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.