U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 13 2007

SRC 06 012 51759

IN RE: Petitioner:
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:

[redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical services corporation. It seeks to employ the beneficiary permanently in the United States as a user support analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 priority date of the visa petition. 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 denial dated November 29, 2005, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 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 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, 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 May 30, 2003. The proffered wage as stated on the Form ETA 750 is $27,000.00 per year.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Relevant evidence in the record includes copies of the following documents: explanatory letters from counsel dated October 10, 2005 and November 9, 2005; the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003 and 2004; the beneficiary's Wage and Tax statements (W-2) for 2002, 2003 and 2004; the beneficiary's pay stub in 2005; financial statements for the period ended July 31, 2005; the petitioner's bank statements from November 29, 2003 to December 31, 2003, December 1, 2003 to December 31, 2003 and two statements for the periods December 1, 2004 to December 31, 2004; a letter from the petitioner's accountant dated November 8, 2005; four photographs of the petitioner's business premises; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1981 and to currently employ 38 workers. According to the tax returns in the record, the petitioner was incorporated in 1994, with S corporation election in 1995. The petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 9, 2003, the beneficiary did claim to have worked for the petitioner since November 2001.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes copies of the following documents: the beneficiary's W-2 statements for 2003, 2004 and 2005; the petitioner's U.S. Internal Revenue Service Form 1120S tax return for 2004; the petitioner's bank statement from October 1, 2004 to December 31, 2004; the petitioner's Form W-2/W-3 statements for 2004 and 2005; the petitioner's bank statement dated December 30, 2005, stating account balances as of May 24, 2000, December 31, 2003 and December 31, 2004; two of the petitioner's bank statement statements for the period December 1, 2004 to December 31, 2004; approximately 21 invoices for the services of Instituto de Computacion ABCS paid by the petitioner in 2004; approximately eleven pages of personal account statements, the owner of petitioner's personal joint federal tax return and W-2 statement of [redacted], an affidavit from [redacted] attested January 23, 2006; the petitioner's unaudited financial statement as of September 30, 2005; the petitioner's financial projections for 2006; evidence of personal transfers of the petitioner's owner and his father; and two non-precedent AAO decisions.

On appeal, counsel asserts that the wages paid to the beneficiary by the petitioner, and the petitioner owner's "intent and ability" to capitalize the petitioner with personal assets as well as by "additional business funds and factors" all demonstrate the ability to pay the proffered wage. Counsel asserts that compensation of officers in 2004 represents net profits that the company would use to pay the beneficiary's wages and the wages of any "potential additional employees."

Counsel contends that the proffered wage as pro-rated from the priority date and the wage paid the beneficiary by the petitioner in 2003 are evidence of the ability to pay. Counsel cites a Citizenship and Immigration

[1] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, in support of this contention.

In year 2004, counsel asserts that the wages paid to the beneficiary in 2004, and the fact that the petitioner "employed an outside-provider to perform some of the duties of the offered position, spending over $16,000.00 for this position" is evidence of the ability to pay the proffered wage. Counsel contends that considering the "assets" of the petitioner and wages paid in 2004 are evidence of the ability to pay the proffered wage.

Counsel asserts that the petitioner's checking and savings accounts are evidence of the ability to pay the proffered wage.

Counsel asserts that the wages paid to the beneficiary, the petitioner's net income, the projection of future net profits and the balance in the petitioner's savings account are evidence of the ability 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

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 tax years 2002, 2003, 2004 and 2005, the petitioner paid the beneficiary wages of $17,010.89, $19,707.85, $19,163.17 and $22,184.38 respectively. One earnings statement was submitted from the petitioner to the beneficiary stating wages paid of $18,655.14 year to date as of October 28, 2005. On appeal, counsel asserts that since the petitioner has paid the beneficiary in tax years 2002, 2003, 2004 and 2005, wages of $17,010.89, $19,707.85, $19,163.17 and $22,184.38 respectively that according to the language in Mr. Yates' memorandum,[2] it has established its continuing ability to pay the proffered wage beginning on the priority date.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the

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[2] Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. One earnings statement was submitted from the petitioner to the beneficiary stating wages paid of $18,655.14 year to date as of October 28, 2005.

beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Since the proffered wage is $27,000.00 per year, the petitioner has not paid the beneficiary the proffered wage according to the evidence submitted.

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date May 30, 2003. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits exceeded the proffered wage 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2002, the Form 1120 stated net income[3] of $22,625.00.
- In 2003, the Form 1120 stated a loss of <$37,992.00>[4].
- In 2004, the Form 1120 stated a loss of <$26,353.00>.

Since the proffered wage is $27,000.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for years 2002, 2003 and 2004, and, through wages paid to the beneficiary in 2003 and 2004. The ability to pay the proffered wage is established for year 2002.[5]

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[3] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

[4] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

If the net income the petitioner demonstrates it had available during the 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.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2003 and 2004 were <$1,049.00> and <$31,480.00>.

Therefore, for tax years 2003 and 2004 which tax returns were submitted, 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 in 2003 and 2004.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[7] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts that the "intent and ability" to capitalize the business with the petitioner owner's personal assets as well as by "additional business funds and factors" from un-named sources all demonstrate the ability to pay the proffered wage. Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc.

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[5] Net income is greater in year 2002 than the difference between wages actually paid and the proffered wage (i.e. $22,625.00 is greater than $27,000.00 minus wages paid in 2002, $17,010.89.

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

[7] 8 C.F.R. § 204.5(g)(2).

Comm. 1980). Consequently, 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."

Counsel asserts that compensation of officers in 2004 represents net profits that the company would use to pay the beneficiary's wages and the wages of any "potential additional employees." The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. We note that there was no compensation of officers stated in years 2002 and 2003 for the petitioner. There is no explanation in the record or in counsel's brief concerning this fact. Since the petitioner has the obligation to pay the proffered wage from the priority date, clearly stating that the owner of petitioner in 2004 would share his compensation to pay the beneficiary's wages and the wages of any "potential additional employees" is insufficient as evidence of the petitioner's ability to pay the proffered wage from the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel contends that the proffered wage as pro-rated from the priority date and the wage paid the beneficiary by the petitioner in 2003 are evidence of the ability to pay. Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel asserts that the wages paid to the beneficiary in 2004, and the fact that the petitioner "employed an outside provider to perform some of the duties of the offered position spending over $16,000.00 [i.e. $16,057.42] for this position" all are evidence of the ability to pay the proffered wage. Counsel's assertions are not evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We note that the beneficiary has been employed by the petitioner since November 2001. We have reviewed and compared the duties of user support analyst (Form ETA 750, Part A, section 13) with the current duties of the beneficiary as user support analyst and find them identical. It is not clear why paying the beneficiary the prevailing wage and employing the beneficiary under a permanent residency visa will change the present or future scope of employment that appear identical. If the beneficiary could not provide services that required use of an outside contractor in 2004, then it is unclear how this is evidence of the ability to pay the proffered wage.

Counsel contends that the petitioner's "assets" are evidence of the ability of the petitioner to pay the proffered wage. It is unclear to what assets counsel refers but if total assets, counsel does not provide a published citation relating to the use of total assets. We reject the petitioner's assertion that the petitioner's total assets

should have been considered in the determination of the ability to pay the proffered wage. 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.

Counsel has submitted the petitioner's unaudited financial statements as evidence of the ability to pay the proffered wage. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel asserts that the petitioner's checking and savings accounts are evidence of the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is 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 bank statements somehow reflect additional available funds that were not reflected on its 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. While balances in savings account may be considered as evidence of the ability to pay the proffered wage, we note that that the petitioner only established these accounts after 2004 according to the tax return submitted, and although counsel refers to these accounts in 2005, no income tax return was submitted for 2005 to reflect the status of those accounts. The petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel states that the projection of future net profits of the petitioner is evidence of the ability to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel cites the case precedent of *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), and non-precedent AAO decisions[8] in support of counsel's contentions. *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967),

[8] While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished

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

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the years 2003 or 2004 were an uncharacteristically unprofitable period for the petitioner.

The evidence submitted fails to establish that the petitioner has 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.

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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).