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

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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 16 2007

LIN 04 222 50453

IN RE: Petitioner: [redacted]

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:

[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 director, Nebraska Service Center, denied the preference visa petition and a subsequent motion to reopen. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a vegetarian Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. 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 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 August 9, 2005 denial and the director's December 19, 2005 decision on the petitioner's motion to reopen, 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 $10.50 per hour ($21,840 per year).[1] The Form ETA 750 states that the position requires two years of relevant work experience in the proffered position and experience in preparation of vegetarian dishes of low calorie from South India, North India and Gujarat including various appetizers according to city of Chicago Health code and regulations.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[2] Relevant evidence submitted to the record on appeal includes counsel's brief, checks drawn on a Foster Bank account for the petitioner during tax year 2001 and 2002; invoices for heating and cooling work performed in April 2001; and a list of restaurants including the petitioner that participated in the 2003 and 2004 Taste of Chicago event along with amounts of gross sales for each respective year. The petitioner also submitted copies of unaudited balance sheets or liabilities and equity sheets for tax years 2001, 2002, 2003 and 2004; quarterly wage reports for the state of Illinois for the last quarter of 2004, and all four quarters of 2005, that indicated the petitioner paid the beneficiary $3,360 in 2004 and $21,840 in tax year 2005. The petitioner also submits Form 941, Employer's Quarterly Federal Tax Return, for the last quarter of 2001 that indicated the petitioner paid wages and tips, plus other compensation of $23,000. The petitioner also submits some documentation on state of Illinois Annual Withholding Income Tax Return for 2001, and Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return. The petitioner also submits the beneficiary's W-2 Form for tax year 2005 that indicates the beneficiary earned $21,840 in tax year 2005. The petitioner also submits bank statements for the petitioner's Foster Bank checking account including the months of April, June, August, and October of 2001; January, April, July, August, and November of 2002; and April, September, October, November, and December of 2003.

The record also contains documentation on a line of credit[3] with MB Financial Bank, Lincolnwood, Illinois in the amount of $176,106.85; the petitioner's Forms 1120S for tax years 2001, 2002, 2003, and 2004, and clippings of the petitioner's newspaper reviews, and articles on the petitioner's participation in the Taste of Chicago food event in the years 2003, 2004, and 2005.

On appeal, counsel states that the petitioner established it was capable of paying the proffered wage for the years 2001 to 2004, because the beneficiary worked for the petitioner at the proffered wage during this period of time. Counsel states that the petitioner's officer was paid a salary which was then actually paid to the beneficiary. Counsel also notes that the petitioner's owner chose to pay for improvements to the property housing the petitioner for the year 2001 out of the petitioner's corporate assets/income rather than out of their own personal funds, and that the payments for these improvements, which were in excess of the proffered wage could be used to determine the petitioner's ability to pay the proffered wage in 2001. Counsel also notes

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[1] The director erroneously stated that the proffered wage is $20,800 per year. However, this error does not affect the ultimate outcome of the appeal.

[2] 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).

[3] The letter from [redacted] Assistant BCM, of the Lincolnwood bank is dated May 10, 2005 and is addressed to [redacted], identified in the petitioner's 2002 and 2003 tax returns as the petitioner's 100 percent shareholder. Thus, the record is not clear whether the line of credit is for the petitioner, or for the petitioner's owner.

that the petitioner's owners, in error, wrote checks from the corporate earnings which paid for their non-corporate earnings and personal needs, for the years 2001 to 2004. Counsel also notes that the petitioner's income tax returns show loans, characterized as corporate liabilities to the owners/corporate officers/shareholders and that these loans are in excess of the proffered wage. Counsel states that these loans were for improvement to the petitioner's owner's building and, as such, added to the personal benefit of the owners, increasing the property value. Counsel states that the payments made on the loans in question during 2001 to 2004 should be viewed as available assets/funds which would have been readily used by petitioner for payment of the proffered wage.

Counsel also submits to the record a letter written by [redacted] the husband of the petitioner's principal shareholder and sole director. [redacted] refers to an unpublished AAO decision and states that the petitioner suggested that the beneficiary would replace [redacted] the principal shareholder and director, who wants to devote more time to marketing and not to cooking. [redacted] also states that in 2001, the petitioner had two other employees, [redacted] and [redacted] who were paid $4,800 each. [redacted] states that the wages of these other two employees, namely, $9,600 could be used toward the proffered wage of $21,840. [redacted] also states that the proffered wage should be pro-rated from April 27, 2001, the priority date and that the proffered pro-rated wage for tax year 2001 would be $13,440. [redacted] also refers to another unpublished AAO decision and then states that the argument can be made that [redacted] was not the officer of the corporation and that his salary was used to pay the proffered wage to the beneficiary since the beneficiary received her employment authorization in November 2004.

[redacted] appears to suggest that either the replacement of other employees in 2001 by the beneficiary or the checks submitted to the record as evidence be utilized to analyze whether the petitioner has the ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on July 13, 1998, and to currently employ four workers. On the Form ETA 750, signed by the beneficiary on April 26, 2001, the beneficiary did not claim that she worked for the petitioner.

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 (Reg. Comm. 1967).

The AAO notes that [redacted] assertion submitted on appeal with regard to prorated wages is not persuasive. The AAO will not 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. The AAO further notes that [redacted] also refers to two unpublished AAO decisions in his letter to the record on appeal.[4] 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, unpublished 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).

With regard to the letter referencing a line of credit, if the line of credit was extended to the petitioner's owner and 100 percent shareholder, 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. 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. In the alternative, if the line of credit was extended to the petitioner, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms,* 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner also submitted bank statements to the record to establish its ability to pay the proffered wage. However, the petitioner'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 returns, such as the petitioner's taxable income

[4] Counsel in his cover letter that accompanies [redacted] letter requests that these case decisions be considered in the AAO proceedings.

(income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner also submits unaudited balance sheets for tax years 2001 to 2004 to the record to establish its ability to pay the proffered wage.[5] The petitioner'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.

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, although the petitioner claims the beneficiary has worked for it since 2000 to the present, the beneficiary did not indicate any such employment in tax year 2000 and to the date she signed the Form ETA 750 on April 26, 2001. Thus the record is inconsistent. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The petitioner has submitted evidence of wages paid to the beneficiary in the last quarter of tax year 2004 and during tax year 2005. Based on the beneficiary's earnings in 2005, the petitioner did pay the beneficiary the proffered wage in 2005. However, 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). The petitioner provided no evidence of the payment of wages to the beneficiary during the 2001 priority year or in tax years 2002, 2003, and the remainder of 2004. The statements on appeal with regard to the wages paid to Mr. Sheth being given to the beneficiary as wages during the relevant period of time are not persuasive. The record contains no further evidentiary documentation to support these assertions. With regard to Mr. Sheth's assertion that the wages paid to other employees in 2001could be available to establish the petitioner's ability to pay the proffered wage, the wages paid to other employees in 2001 constitute expenditures already made, and thus are not viewed as additional funds with which to pay the proffered wage. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe from the priority date in 2001 and up to the last quarter of tax year 2004. Thus, the petitioner has to establish its ability to pay the entire proffered year in tax years 2001 to 2003, and the difference between the beneficiary's actual wages in 2004 and the proffered wage, or $18,480.

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

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[5] Although these documents note at the bottom of each page "see accompanying accountant's compilation report", no accountant's compilation report accompanies the documents. Therefore the documents are not considered compiled financial statements. The AAO notes that even if an accountant's compiled report accompanied the documents, they would not be considered sufficient evidence to establish the petitioner's ability to pay the proffered wage.

federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend 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* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $21,840 per year from the priority date:

- In 2001, the Form 1120S stated a net income[6] of -$14,607.
- In 2002, the Form 1120S stated a net income of -$1,821.
- In 2003, the Form 1120 S stated a net income of $7,569.
- In 2004, the Form 1120S stated a net income of $23,964.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the proffered wage. With regard to tax year 2004, the petitioner did have sufficient net income to pay the

[6] 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and deductions shown on its Schedule K for tax years 2001, 2002, 2003, and 2004, the petitioner's net income is found on Schedule K of its tax returns for these years.

difference between the beneficiary's actual wages of $3,360 and the proffered wage of $21,840. However, 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.[7] 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. Contrary to counsel's assertion on appeal, loans made by the petitioner's sole shareholder and her husband to the petitioner are not considered assets available to pay the proffered wage but as part of the petitioner's longer term liabilities, as indicated on line 19, Schedule L. 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 $383.
- The petitioner's net current assets during 2002 were $18,111.
- The petitioner's net current assets during 2003 were $16,705.

Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner did establish that it paid the beneficiary the proffered wage in tax year 2005, and that it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2004 based on its net income. However, from the date the Form ETA 750 was filed with the Department of Labor, the petitioner identified on the instant I-140 petition 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.

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. On appeal, counsel appears to assert that monies spend to improve the building in which the petitioner is located should be used to establish the petitioner's ability to pay the proffered wage in 2001 because the funds used to make the improvements

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[7] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

were taken out of the petitioner's financial resources, rather than the petitioner's owner's resources. However, such payments and/or improvements represent monies already spent, regardless of the source of the funds, and therefore are not considered additional funds with which to pay the proffered wage in 2001.

[redacted] in a final submission to the record also appears to assert that the wages paid to two other employees in 2001 could be considered as funds available to pay the proffered wage. However, the petitioner provides no evidence that these workers were full time cooks, performing the same duties as those of the proffered position or of the beneficiary. Furthermore, the wages paid to other employees are funds already spent and therefore not considered as additional funds with which the petitioner could have paid the beneficiary the proffered wage during 2001, or any other subsequent year until 2005. The record also does not reflect that the beneficiary replaced any other employees whenever she began working for the petitioner, and that this employee in fact was dismissed and the wages paid to the former employee were available to pay the proffered wage to the beneficiary.

On motion, the petitioner states that the totality of the petitioner's circumstances should be considered in reviewing the director's denial on the petition. The AAO notes that the petitioner submitted extensive newspaper clippings with regard to the petitioner's participation in the Taste of Chicago food event in years 2003, 2004, and 2005, as well as restaurant reviews of the petitioner. As previously stated, CIS does consider 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 (Reg. Comm. 1967).

However, *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), 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.

The record has not established that the priority year 2001 was an uncharacteristically unprofitable year for the petitioner. While the petitioner's inclusion in the Taste of Chicago event for three years is noteworthy, considering the limited number of restaurants that participate yearly and the event's high profile in the Chicago community based on the newspaper clippings submitted to the record, this factor in itself would not be sufficient to overcome the evidentiary weight of the petitioner's federal income tax returns for the years 2001 and 2002 with regard to the petitioner's ability to pay the proffered wage during the priority year and during 2002. The AAO notes that petitioner has only been in business for six years prior to filing the I-140 petition, and has four employees, two of which are the petitioner's owner and the owner's husband. The petitioner's two years of unprofitable net income in 2001 and 2002, and modest increases in gross receipts also distinguish the petitioner from the petitioner in *Sonegawa.*

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.