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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

B6.



APR 14 2010

FILE: LIN 06 123 53518 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager.<sup>1</sup> As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the 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, 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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. 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 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, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. 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 ETA Form 9089 as certified

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<sup>1</sup> According to the labor certification, the offered job's title is restaurant general manager.

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on June 3, 2005. The proffered wage<sup>2</sup> as stated on the ETA Form 9089 is \$51,376.00 per year.

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 at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

On August 11, 2006, the director issued a Request for Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. The director requested the petitioner's latest annual report, federal income tax return, or audited financial statements.

In response, counsel submitted an explanatory letter dated October 31, 2006; unaudited financial statements dated December 31, 2005; Schedule L from Form 1120S for 2005; and a letter from the petitioner's accountant dated October 29, 2006, with unaudited financial statements dated December 31, 2006, for the petitioner and other entities.<sup>4</sup>

Other evidence submitted is a letter from counsel dated March 20, 2006; a letter from the petitioner dated March 8, 2006; eight printed pages from the petitioner's website accessed at [REDACTED] > on January 16, 2004; the petitioner's unaudited financial statements dated December 31, 2006; stock share certificates from the petitioner and other entities; a property tax statement for another entity; nine pages of unaudited financial statements dated

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<sup>2</sup> Although the labor certification states that the prevailing wage is \$44,034.00, the offered wage stated on ETA Form 9089, Part G.1., and the Form I-140, is \$51,376.00 per year.

<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 of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>4</sup> Contrary to counsel's and the petitioner's accountant's assertions, U.S. Citizenship and Immigration Services (USCIS) 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.

December 31, 2005, for the petitioner; the petitioner's federal income tax return Form 1120S for 2005, and a federal income tax return for another entity.

On appeal, counsel submitted a legal brief dated September 26, 2007; a bar graph entitled "Origami West Sales Graph w/h Tax" for 2004, 2005, 2006, 2007, and 2008; the petitioner's federal income tax returns Forms 1120S for 2005 and 2006; a letter from the petitioner's accountant accompanied by compiled financial statements<sup>5</sup> dated June 30, 2007; six copies of Internet web pages from [REDACTED] .. > as accessed on April 2, 2007, May 2, 2007, June 8, 2007, July 12, 2007, August 8, 2007, and September 6, 2007; two statements of the petitioner's taxes for the time periods January 1, 2007, to January 31, 2007, and February 1, 2007, to February 28, 2007; a US Bank form entitled "SBA Guaranteed Cash Flow Manager Line of Credit Agreement and Terms with Guaranty;" four printed pages from the petitioner's website accessed at [REDACTED] ... > on September 25, 2007; a bank statement for checking, savings, and a savings certificate dated September 19, 2007, with no account number or account holder information; two checks proceeds representing loans from another entity to the petitioner; a letter statement dated October 29, 2006, from the petitioner; and the petitioner's bank checking account statement for the period April 2, 2007, to April 30, 2007, and an account statement from another entity.

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 2004 and to currently employ 35 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on February 20, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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

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<sup>5</sup> On appeal, counsel submitted the petitioner's financial statements for the first half of 2007. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Accordingly, all of the unaudited financial statements submitted by the petitioner are not probative of its ability to pay the proffered wage.

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, USCIS 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2005 or subsequently.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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 USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

Counsel states on appeal that there is no evidence that the director considered the petitioner's depreciation and amortization expenses<sup>6</sup> as an asset in 2005 as evidence of its ability to pay the proffered wage. With respect to depreciation, the court in *River Street Donuts* noted:

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<sup>6</sup> Intangible assets on a balance sheet are included as "other assets," and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles. Counsel cites as support for his contention a unpublished case of the AAO.

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on November 1, 2006, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s 2006 federal income tax return was submitted on appeal. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2005, the Form 1120S stated net income<sup>7</sup> of <\$30,761.00>.<sup>8</sup>
- In 2006, the Form 1120S stated net income of \$53,205.00.

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<sup>7</sup> Where an S corporation’s income is exclusively from a trade or business, USCIS 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 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 23, 2010) (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 adjustments shown on its Schedule K for 2005, and 2006, the petitioner’s net income is found on Schedule K of its tax returns.

<sup>8</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Therefore, for 2005, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>9</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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 tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$24,226.00.
- In 2006, the Form 1120S stated net current assets of \$35,193.00.

Therefore, for 2005, the petitioner through an examination of its net income or net current assets could not pay the proffered wage.

Counsel asserts that the director was not authorized to request evidence according to the regulation at 8 C.F.R. § 204.5(g)(2), specifically evidence in the form of copies of annual reports, federal tax returns, or "*audited financial statements*." (Counsel's emphasis). Counsel contends that other evidence is also acceptable such as profit/loss statements or bank account records, in addition to the above, according to an internal USCIS memorandum.<sup>10</sup> Counsel's arguments are not persuasive. In this matter, the petitioner submitted its tax returns, including its 2006 tax return on appeal. It has not been established why the consideration of additional evidence, such as unaudited financial statements, would be appropriate in this case. The 2005 tax return, which is one of three types of evidence mandated by the regulations, fails to establish that the petitioner has the ability to pay the proffered wage. It has not been established that this tax return paints an inaccurate financial picture of the petitioner. Also, as explained, *supra*, the unaudited financial statements are not persuasive evidence of the petitioner's ability to pay. Such evidence constitutes the representations of management.

Counsel has also submitted the petitioner's bank account information as proof of its ability to pay. Counsel's reliance on the balances in the petitioner's bank accounts 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. Similarly, while this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation

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<sup>9</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>10</sup> USCIS Interoffice Memorandum (HQPRD 70/6.2.8-P) dated May 12, 2005.

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. Further bank accounts for other entities are not evidence of the petitioner's ability to pay the proffered wage.

Counsel states that the line-of-credit evidenced by a US Bank form entitled "SBA Guaranteed Cash Flow Manager Line of Credit Agreement and Terms with Guaranty" is evidence of the petitioner's ability to pay. In calculating the ability to pay the proffered salary, USCIS 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, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS 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).

Moreover, counsel claims that USCIS should have considered its long term loan from the SBA. Once again, it is unclear how this loan augments the petitioner's financial position or represents funds available to pay the proffered wage which are not accurately represented in its net current assets set forth on its tax returns.

Counsel asserts that the petitioner is one business in a chain of other commonly owned businesses (but separate entities), and the owner of those businesses from "time to time swiftd [sic] the fund [sic] from the downtown business to the new business in the form of loans" and that this is evidenced by checks submitted on appeal. Counsel's contention is misplaced. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530. 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

According to counsel, the petitioner’s accountant asserted that wages paid for “management” in 2004 and 2005, are evidence of the petitioner’s ability to pay the proffered wage from the priority date. However, the record is devoid of evidence establishing who, or what, the beneficiary would be replacing in “managing” the business, if anyone. The record does not specifically identify these managers, state their specific wages, or submit credible evidence that the beneficiary would, in fact, replace them. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, wages already paid to others are generally not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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 ETA Form 9089 was accepted for processing by the DOL.

On appeal, counsel asserts that according to the court decision, *Matter of Sonogawa*, the total circumstances of the petitioner are proof of its ability to pay the proffered wage. Counsel contends that there were demonstrated improvements in both the petitioner’s net worth and net income in 2006, and by implication, that this fact is evidence of the petitioner’s ability to pay the proffered wage in 2005. In 2005, the petitioner could not pay the proffered wage. Counsel’s contention is misplaced since the petitioner has the burden to prove its ability to pay is calculated from the priority date. 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. at 49.

Counsel states that the petitioner’s gross income rose every year from 2004 (i.e. 2004-\$1,294,000.00 to 2007-\$1,800,000.00). Counsel contends that the petitioner’s ability to pay is evidenced by its return to profitability in 2006, and by the unaudited financial statement submitted through the first half of 2007.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. See *Matter of Sonogawa*. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed

California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, despite the director's instruction that the petitioner submit evidence according to the regulation of 8 C.F.R. § 204.5(g)(2), counsel has not submitted audited financial returns or other evidence that the petitioner's negative net income or nominal net current assets were a unique circumstance in 2005. Despite high gross receipts in 2005, the cost of goods sold and its salaries and wages expense together with various other expenses resulted in a negative net income. The petitioner's accountant asserts that if all the controlled entities owned by the sole shareholder are considered the petitioner has the ability to pay. The assets of other entities or shareholders are not evidence of the ability to pay the proffered wage as already stated. Although counsel has provided evidence of the petitioner's sales from 2004 to 2008, its business model and business reputation, there is no explanation why the petitioner could not pay the proffered wage in 2005. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.