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U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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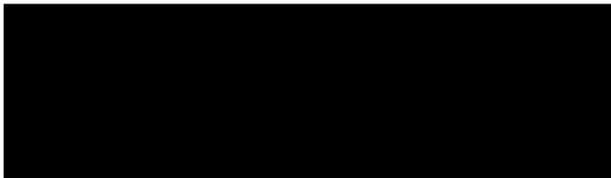
Office: TEXAS SERVICE CENTER

Date: APR 19 2010

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)

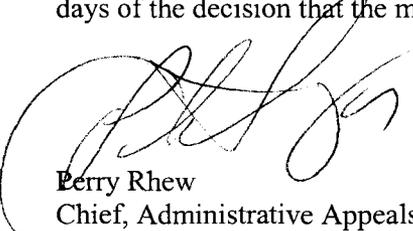
ON BEHALF OF PETITIONER:



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

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a dentist. As required by statute, the petition is accompanied by Form ETA 750, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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 also determined that the beneficiary failed to satisfy the minimum level of education stated on the labor certification. 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 September 25, 2007 denial, the issues in this case are 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 and whether the beneficiary possesses the requisite education for the position as specified by the Form ETA 750.

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 AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N

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<sup>1</sup> 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).

158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on June 17, 2003.<sup>2</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on May 29, 2007.

The job qualifications for the certified position of dentist are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Diagnose and treat diseases, injuries and malformations of teeth and gums and related oral structures, treat diseases of nerve, pulp and other dental tissues affecting vitality of teeth [sic] examine, diagnose and treat dental malocclusions and oral cavity anomalies, [sic] design and fabricate appliances to realign teeth and jaws to produce and maintain [sic] normal function and to improve appearance, extract and replace teeth using rotary and hand instruments, remove pathologic tissue or diseased tissue using surgical instruments, counsel and advise patients concerning dental problems and preventative oral health care services.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements: eight years of college culminating in a doctorate of dental medicine.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, United States Citizenship and Immigration Services (USCIS) must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification. In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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<sup>2</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of a certificate from the University of California, Los Angeles (UCLA) stating that she finished a general practice residency on June 30, 2002 and a copy of the beneficiary's dental license. The beneficiary's resume indicates that she received a doctor of dental medicine from Boston University School of Dentistry in 2002, however, a copy of that diploma does not appear in the record.<sup>3</sup> Although completion of a dental residency and procurement of a dental license infers that an educational degree has been awarded, the documents submitted do not indicate exactly what type of educational degree was conferred.

The California Dental Board's website states that a dental license may be procured by a passing examination taken by "graduates of schools accredited by the American Dental Association Commission on Dental Accreditation" or

all persons who have been issued a degree of doctor of dental medicine or doctor of dental surgery by a foreign dental school not approved by the Board or accredited by a body that has a reciprocal accreditation agreement with a commission or accreditation organization all persons who have been issued a degree of doctor of dental medicine or doctor of dental surgery by a foreign dental school not approved by the Board or accredited by a body that has a reciprocal accreditation agreement with a commission or accreditation organization

or may obtain a license through residency "on the basis of completion of a minimum of 12 months of a general practice residency or advanced education in general dentistry program approved by the ADA's Commission on Dental Accreditation." See [http://www.dbc.ca.gov/applicants/dds/become\\_licensed.shtml](http://www.dbc.ca.gov/applicants/dds/become_licensed.shtml) (accessed November 2, 2009). The residency requirements for the UCLA dental program state that "Official transcripts from undergraduate institution, dental school and any graduate programs" must be submitted with applications. See <http://uclasod.dent.ucla.edu/admissions/index.asp?id=362> (accessed November 2, 2009).

Neither the California Dental Board nor the UCLA School of Dentistry expressly require the applicant hold a Doctorate of Dental Medicine, the degree required by the Form ETA 750. The Occupational Outlook Handbook produced by the Bureau of Labor Statistics provides guidance. That Handbook states: "All 50 States and the District of Columbia require dentists to be licensed. To qualify for a license in most States, candidates must graduate from an accredited dental school and pass written and practical examinations. . . . Most dental schools award the degree of Doctor of Dental Surgery (DDS). Others award an equivalent degree, Doctor of Dental Medicine (DMD)." See <http://www.bls.gov/oco/ocos072.htm> (accessed November 2, 2009). Although the beneficiary's

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<sup>3</sup> Although the director stated that no diploma appears in the record and counsel asserts on appeal that the "diploma was somehow mixed up with other papers at the Service" or otherwise was submitted and not included in the record, counsel did not submit a copy of the diploma on appeal. Instead, the petitioner submitted two certificates verifying the beneficiary's dental residency and a copy of her dental license issued by the state of California.

degree was not submitted, the UCLA residency certificate uses the abbreviation DMD after the beneficiary's name. We would be willing to conclude that the beneficiary has the required degree based on the abbreviation used, however, the record does not contain the degree, or show that it was obtained following eight years of college education as specifically required by the labor certification. In any further filings, the petitioner should submit a copy of the beneficiary's educational credentials to exhibit eight years of education, and completion of the Doctor of Dental Medicine degree as required by the terms of the labor certification.

Regarding the second issue, the petitioner's ability to pay, 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 Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on June 17, 2003. The proffered wage as stated on the Form ETA 750 is \$69.98 per hour (\$145,558 per year).

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 1994 and to currently employ fifteen workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750, signed by the beneficiary on May 28, 2004, the beneficiary claimed to have begun working for the petitioner in September 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic 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, 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 submitted payroll records covering the period January 7, 2003 to October 22, 2007. The amounts received appear in the following table:

- In 2003, the petitioner paid the beneficiary \$55,066.99.
- In 2004, the petitioner paid the beneficiary \$101,662.76.
- In 2005, the petitioner paid the beneficiary \$112,020.52.
- In 2006, the petitioner paid the beneficiary \$133,992.98.<sup>4</sup>
- In 2007, the petitioner paid the beneficiary \$120,708.94.

These amounts that the petitioner paid the beneficiary are less than the proffered wage. We will not extrapolate that the beneficiary continued to receive remuneration at the same rate for the rest of 2007. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage, which in 2003 was \$90,491, in 2004 was \$43,896, in 2005 was \$33,538, in 2006 was \$11,565, and in 2007 was \$24,849.

We note that the petitioner presented additional payroll records demonstrating that the beneficiary received additional salary amounts from [REDACTED] and [REDACTED]. All of the payroll records are stamped "West Coast Dental Group" and the petitioner's 2006 tax return bears the name of West Coast Dental Group as well,<sup>5</sup> however, there is no evidence in the record to establish that the petitioner is anyone other than [REDACTED] or that these other dentists are in any other way related to the petitioner such as by sharing a tax identification number. **Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). As a result, we will only consider the wages paid by [REDACTED] as the petitioning entity.<sup>6</sup>**

<sup>4</sup> The letter from [REDACTED] for the petitioner, states that the beneficiary was paid \$108,282.59 in 2004, \$114,481.94 in 2005, and \$124,813.29 in 2006. [REDACTED] cites to no supporting documentation to show how he arrived at these figures. The figures used in the table above represent the amounts appearing on the pay receipts, so we are unclear as to how [REDACTED] arrived at different calculations.

<sup>5</sup> Tax returns for prior years show a different address for the petitioner and that it operated as "the Dental Group of Torrance."

<sup>6</sup> In any further filings, the petitioner should submit the beneficiary's W-2 statements to evidence the total wages that the petitioning entity paid to the beneficiary.

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.

On appeal, the petitioner argues that its aggressive depreciation amount should be taken into account. With respect to depreciation, the court in *River Street Donuts* noted:

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*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added). As a result, we will not take into account the amounts

that the petitioner used in valuing its depreciation amount. Similarly, we will not look at the total assets in isolation as the petitioner urges us to do.

The record before the director closed on August 28, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2003 through 2006, as shown in the table below.

- In 2003, the Form 1120S stated net income (loss)<sup>7</sup> of -\$114,689.
- In 2004, the Form 1120S stated net income of \$239,204.
- In 2005, the Form 1120S stated net income of \$96,762.
- In 2006, the Form 1120S stated net income of \$700.

Therefore, the petitioner did not demonstrate sufficient net income to pay the difference between the actual wage paid and the proffered wage in 2003 or 2006. The petitioner demonstrated sufficient net income to pay the difference in the actual wage paid and the proffered wage in 2004 and 2005.

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>8</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 for 2003 and 2006, as shown in the table below.

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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 23 (2001-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 26, 2009) (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 no additional adjustments shown on its Schedule K in any of the years at issue, the petitioner's net income is found on line 21 of page one.

<sup>8</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.

- In 2003, the Form 1120S stated net current assets (liabilities) of -\$387,462.
- In 2006, the Form 1120S stated net current assets (liabilities) of -\$70,179.

Therefore, for the years 2003 and 2006 the petitioner did not demonstrate sufficient net current assets to pay the difference between the actual wage paid and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, the petitioner asserts that its status as "a large business enterprise with millions of dollars in annual income and hundreds of thousand [sic] of dollars in annual profits" and an undated letter submitted on appeal from the chief financial officer, [REDACTED] demonstrates its ability to pay the proffered wage.

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 DOL. The letter from [REDACTED] states that the petitioner "has produced over \$1.7 million in profit in years 2003 to 2006." The letter provides no analysis for how this figure was calculated and we see no support for the statement in the submitted documentation including the tax returns. We note that the chart included in [REDACTED] May 7, 2007 letter includes total collections numbers that differ from the gross receipt line on the tax returns for 2003, 2005, and 2006. This letter, like the undated letter, contains no analysis or explanation as to how [REDACTED] arrived at the figures used. 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)).

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*, 12 I&N Dec. 612 (BIA 1967). 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 *Sonogawa* 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, the petitioner did not demonstrate some sort of off year or that other circumstances demonstrate that the tax returns do not paint an accurate financial picture of the petitioner's ability to pay the proffered wage. Nor did the petitioner submit evidence of its reputation that would liken its situation to the one presented 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.