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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

[redacted]NT

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 02 2010
SRC 07 229 52492

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 painting and decorating business. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 from the priority date of the visa petition onwards. 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 February 24, 2009 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 30, 2002.[1] The proffered wage as stated on that form is $840 per week (or $43,680 annually). The Form ETA 750 also states that the position requires two years of experience in the proffered position or in the related position of decorative painter.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 1992 and that it has 11 employees. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on July 22, 2002, the beneficiary claimed to have worked for the petitioner from March 1998 until the date that he signed that form.

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, USCIS

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[1] United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has petitioned for seven additional beneficiaries whose petitions are currently pending. Two of these petitions have a priority date of April 25, 2001 and a proffered wage of $43,680. Those cases are on appeal to this office. The petitioner also petitioned for a fourth beneficiary. The priority date on that petition is July 30, 2002. The proffered wage in that case is $43,680. That case is on appeal to this office, as well. The petitioner also has two approved petitions , respectively) for two beneficiaries, having a priority date of July 30, 2002. The beneficiaries in those two cases have not yet adjusted to lawful permanent residence. This office currently does not have information regarding the proffered wages in those two cases. Two other petitions are on appeal for which this office does not have additional information such as the priority date or proffered wages, respectively.) Both of these petitions were filed during 2007.

Thus, during 2002 and following, the petitioner had five additional sponsored workers whose petitions were pending. Since at least 2007, the petitioner has had seven additional petitions pending. This office notes that the two petitions added in here in 2007 may in fact have priority dates in 2002 like the instant petition. In which case, two additional sponsored workers petitions, beyond those listed here, would have been pending throughout 2002 through 2006.

[2] 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). Here, the record 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).

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).

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. Here, the petitioner did not provide any documentation of having paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the relevant 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 (1st 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 not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

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.

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 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). Thus, this office rejects any suggestion made in these proceedings that USCIS should consider the petitioner's depreciation amounts as funds available to pay the wage.

The record before the director closed on October 15, 2008 with the receipt of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. Thus, the 2007 tax return is the most recent return in the record. The petitioner's tax returns demonstrate its net income for 2002 through 2007, as shown in the table below:

- The 2002 Form 1120S states net income[3] of $3,387.
- The 2003 Form 1120S states net income (loss) of -$5,341.
- The 2004 Form 1120S states net income (loss) of -$21,790.
- The 2005 Form 1120S states net income (loss) of -$1,556.
- The 2006 Form 1120S states net income of $40,797.
- The 2007 Form 1120S states net income of $20,069.

During the years 2002 through 2007, the petitioner did not have sufficient net income to pay the proffered wage of $43,680. It also did not have sufficient net income to cover the wages of all its other sponsored workers whose petitions were pending during all or part of the relevant period.

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

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[3] 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 (2002-2003) line 17e (2004-2005) and line 18 (2006-2007) of the Schedule K. *See* Instructions for Form 1120S, 2009, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 23, 2010) (which indicate that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner did have additional income and other adjustments shown on its Schedule K in 2002 and 2003. In those years, its net income is found on the Schedule K. In 2004 through 2007, its net income is found on page one, line 21 of the return.

petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 reflect its end-of-year net current assets for 2002 through 2007, as follows:

- The 2002 Form 1120S states net current assets of $33,767.
- The 2003 Form 1120S states net current assets of $58,915.
- The 2004 Form 1120S states net current assets of $22,789.
- The 2005 Form 1120S states net current assets (liabilities) of -$9,930.
- The 2006 Form 1120S states net current assets (liabilities) of -$7,123.
- The 2007 Form 1120S states net current assets of $495.

Thus, for the years 2002 and 2004 through 2007, the petitioner did not have sufficient net current assets to pay the instant wage. In 2003, it did not have sufficient net current assets to pay the instant wage and its other sponsored workers' wages whose petitions were pending during that year.

The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel suggested in her letter dated October 9, 2008 submitted in reply to the RFE that adding on the beneficiary as an employee will improve the petitioner's productivity and cause its net income to increase such that it will have funds available to pay the beneficiary's wage. She indicated that USCIS should find that the petitioner has shown the ability to pay based on this theory that the beneficiary's labor will increase the petitioner's net income. This is not correct. 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).

Counsel has also indicated in these proceedings that the AAO should consider the petitioner's long-term assets such as its property or buildings listed on its Schedule L as representing funds available to pay the instant wage and all its sponsored workers' wages. Counsel implied too that this office should consider the value of such long-term assets without balancing their value against the petitioner's liabilities. This is not correct. As noted previously, the AAO will consider only current

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

assets (items having a life of one year or less such as inventory, marketable securities, etc.) balanced against current liabilities when determining, based on the Schedule L, the amount that the petitioner has available during a given year to pay the wage. This office would underscore that buildings are not readily liquefiable. The AAO also finds that it is not likely that the petitioner would liquefy an asset so crucial to the running of its business as its buildings in order to pay a sponsored worker's wage or all its sponsored workers' wages. *See* Section 204(b) of the Act, 8 U.S.C. § 1154(b)(which states that USCIS may reject a fact stated in the petition if it does not believe that fact to be true); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, counsel indicated that the petitioner could have obtained an equity loan each year in the relevant period and that the proceeds from such loans should be considered funds available to pay the wage. This is not correct. First, the petitioner did not document for the record that it was eligible for an equity loan. Going on record without supporting documentary evidence is not sufficient to meet 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)). Unsupported representations are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if the petitioner could document that it qualified for an equity loan, USCIS will not augment the petitioner's net income or net current assets by adding in funds from a loan which is not an existent loan. USCIS will only consider funds the petitioner documents are available at the time of filing the petition and throughout the relevant period. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971)(which states that 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.) Furthermore, the petitioner's existent loans would have been reflected in the balance sheet provided in the tax return and would have been fully considered in the evaluation of the corporation's net current assets. Also, when the petitioner wishes to rely on a loan as evidence of ability to pay, the petitioner must submit documentary evidence of the loan and of a detailed business plan and audited cash flow statements to demonstrate that the loan will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and other debt as a means of paying salary since debts will increase the firm's liabilities and will not improve its overall financial position. Although loans 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 and the wages of all its sponsored workers. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also suggested that the petitioner could liquidate the trucks and automobiles which it owns and that USCIS should consider the proceeds from such sale as funds available to pay the instant wage and the petitioner's other sponsored workers' wages. The AAO cannot apply this suggestion. First, the petitioner did not document for the record that it owns vehicles; that it does not owe payments on these vehicles; etc. Going on record without supporting documentary evidence is not sufficient to meet 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)). Unsupported representations are not evidence and are not sufficient to demonstrate the

ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if the petitioner could document that it owned vehicles outright and that it was able to find buyers for them, the petitioner is a painting and decorating company; as such, it needs vehicles in the running of its business. It is not likely that the petitioner would sell its vehicles, assets which are crucial to its business, to pay the beneficiary's wage and its other sponsored workers' wages. *See* Section 204(b) of the Act, 8 U.S.C. § 1154(b)(which states that USCIS may reject a fact stated in the petition if it does not believe that fact to be true); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel has also asserted that the petitioner's Certified Public Accountant's letter dated October 8, 2007 in the record indicates that the petitioner's husband and wife owners also own other businesses. Counsel suggested that funds from these businesses and from real estate and other assets owned by these businesses could be used to cover the proffered wage and the petitioner's other sponsored workers' wages. This is not correct. First, there is no documentary evidence in the record to support the assertion that the petitioner owns other businesses which in turn own real estate and other assets, or that these businesses are profitable.[5] Going on record without supporting documentary evidence is not sufficient to meet 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)). Unsupported representations are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if the petitioner documented that its owners did own other businesses and that they had significant income from those businesses and/or from the real estate or other assets owned by those businesses, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owners 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). 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." Consequently, the assets of the petitioner's shareholders, including their stated income from other businesses or businesses' real estate assets or other assets, or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Likewise, funds in the petitioner's shareholders' bank accounts, as documented in the record, and any claimed real estate holdings of these shareholders cannot be considered in determining the petitioner's ability to pay the proffered wage and all its sponsored workers' wages.

Any suggestion that loans to shareholders as reflected on the tax returns in the record should be considered funds available to pay the wage is also incorrect. Again, a corporation is a separate and

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[5] Counsel indicated that the petitioner's owners' individual tax returns were submitted into the record. This is incorrect.

distinct legal entity from its owners and shareholders. Thus, the assets of its shareholders or of other enterprises or corporations, such as loans to shareholders, 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). *See also Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003)(which states that "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.")

In addition, counsel indicated on appeal that the petitioner's owners are willing and able to pay the proffered wage and all the sponsored workers' wages out of their own general resources, if the petitioner is not able to cover these wages out of its own funds. The AAO would underscore that there is no statement from the petitioner's owners in the record to indicate that they are, in fact, able and willing to cover the proffered wages of the petitioner's sponsored workers from the priority date onwards. Going on record without supporting documentary evidence is not sufficient to meet 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)). The unsupported assertions of counsel are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage, as counsel indicated on appeal. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). 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 not able 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.

Here, the petitioner indicated on the petition that it incorporated in 1992 and has 11 employees. Counsel suggested on appeal that because the petitioner's net income increased from taking losses

toward the beginning of the relevant period to having a relatively small positive net income in 2007, that USCIS should find that based on the totality of the circumstances, the petitioner has shown an ability to pay the wage from the priority date onwards. However, this office finds that an increase from net losses in 2003, 2004 and 2005 to a positive net income of $20,069 in 2007 does not demonstrate an ability to pay the proffered wage of $43,680 as well as the other sponsored workers' wages from the 2002 priority date year onwards. Further, the petitioner has not established its historical growth since incorporating. Its gross sales or receipts have not steadily increased, but have fluctuated, as follows: $770,712 in 2002; $898,058 in 2003; $742,228 in 2004; $601,739 in 2005; $862,682 in 2006; and $1,144,284 in 2007. In addition, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, the AAO finds that the petitioner has not established that it has had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner has had the continuing ability to pay the proffered wage from the priority date onwards. Therefore, the appeal must be dismissed.

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.