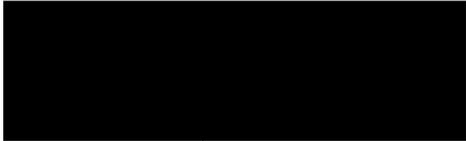


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



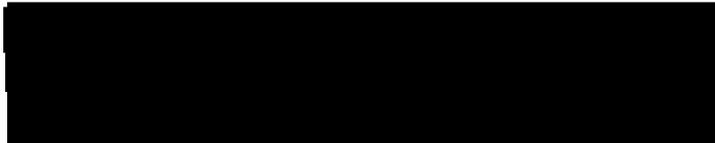
B6

FILE: LIN-08-218-52265 Office: NEBRASKA SERVICE CENTER Date: DEC 30 2010

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

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 \$630. 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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates homes for the elderly. It seeks to employ the beneficiary permanently in the United States as a home health aid pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish the ability to pay the proffered wage as of the priority date, and therefore, denied the petition.

The record shows that the appeal is properly filed and 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.

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 upon appeal.¹

As set forth in the director's July 29, 2009 denial, the primary issue in this case is whether or not the petitioner has established its 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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ 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). In the instant case, counsel submitted new evidence on appeal.

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 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 March 14, 2008. The proffered wage as stated on the ETA Form 9089 is \$7.66 per hour (\$15,932.80 per year). On the petition, the petitioner claims that the business was established in 2002 and has two employees.² The petitioner did not provide any information about its gross and net annual income on the petition, and the beneficiary did not provide any information about her employment history on the ETA Form 9089.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an 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 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, United States Citizenship and Immigration Services (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. The petitioner did not submit any documentary evidence showing that the petitioner paid the instant beneficiary any compensation in any relevant year. Therefore, the petitioner failed to establish its ability to pay the proffered wage through examination of wages paid to the instant 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. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual

² On the petition [REDACTED] filed for Ocampo on September 24, 2007, the petitioner claimed that the business was established on February 1, 2001 and had three employees. The record does not contain any explanation for this inconsistency.

owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. Therefore, USCIS will consider the individual's adjusted gross income, assets and personal liabilities as part of the petitioner's ability to pay the proffered wage. The sole proprietors must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is March 14, 2008 in this case. Therefore, the petitioner must establish its ability to pay the proffered wage from 2008 to the present. However, the record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns, or audited financial statements for 2008 onwards. The record before this office closed on August 24, 2009 with the receipt of the petitioner's appeal. As of that date the sole proprietor's federal tax return, annual report or audited financial statements for 2008 should have been available. However, the petitioner did not submit the sole proprietor's 2008 tax return, annual report or audited financial statements, nor did counsel explain why any of these documents was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The annual reports, tax returns or audited financial statements would have demonstrated the amount of the sole proprietor's adjusted gross income the sole proprietor reported to the Internal Revenue Service (IRS) and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. If all required initial evidence is not submitted, USCIS in its discretion may deny the application or petition for lack of initial evidence. See 8 C.F.R. § 103.2(b)(8)(ii).

The record contains the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 2003 through 2007.³ Since the petitioner already established its ability to pay the instant beneficiary the

³ Although counsel indicated in her submission letter dated March 27, 2009 that she was submitting the petitioner's Federal Tax Return for the years 2002, 2003, 2004, 2005, 2006 and 2007, the record does not contain the sole proprietor's tax return for 2002.

proffered wage through examination of wages paid to the beneficiary for 2007, the sole proprietor's 2007 tax return is not necessarily dispositive. The sole proprietor's individual tax returns show that she supported a family of two in the years 2003 through 2005, and a family of four in 2006. The sole proprietor's tax returns reflect the proprietor's adjusted gross income for the years 2003 through 2006 as below:

Year	Adjusted Gross Income ⁴
2003	
2004	
2005	
2006	

For 2002, the year of the priority date, the petitioner did not submit any documentary evidence showing that it paid the instant beneficiary any compensation. Therefore, the petitioner must establish that the sole proprietor had sufficient adjusted gross income to pay the beneficiary the full proffered wage of [REDACTED] as well as to cover the sole proprietor's household living expenses. However, the petitioner did not submit any regulatory-prescribed documentary evidence such as annual reports, the sole proprietor's federal tax returns or audited financial statements for 2002. Without these documents, the AAO cannot determine whether the petitioner had the ability to pay the proffered wage that year. Thus, the petitioner failed to establish its ability to pay the proffered wage because it failed to submit regulatory-prescribed evidence for 2002.

In 2003, the petitioner paid the beneficiary a partial proffered wage of [REDACTED] and thus, the petitioner must demonstrate that the sole proprietor had sufficient adjusted gross income to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage and to cover the sole proprietor's household living expenses. The sole proprietor had adjusted gross income of [REDACTED] which was sufficient to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage. However, the record does not contain a statement of monthly living expenses for the sole proprietor's household. Without such a statement, the AAO cannot determine whether the balance of [REDACTED] after paying the beneficiary the difference between wages actually paid to the beneficiary and the full proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses for the year of 2003. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2003.

In 2004, the petitioner paid the beneficiary a partial proffered wage of [REDACTED] and thus, the petitioner must demonstrate that the sole proprietor had sufficient adjusted gross income to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage and to cover the sole proprietor's household living expenses. The sole proprietor had adjusted gross

⁴ Adjusted gross income reflects on Line 33 of the Form 1040 for 2001, Line 35 for 2002, Line 34 for 2003, Line 36 for 2004 and Line 37 for 2005 through 2007.

income of [REDACTED] which was sufficient to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage. However, the record does not contain a statement of monthly living expenses for the sole proprietor's household. Without such a statement, the AAO cannot determine whether the balance of [REDACTED] after paying the beneficiary the difference between wages actually paid to the beneficiary and the full proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses for the year of 2004. Further, the AAO notes that the sole proprietor claimed itemized deduction of [REDACTED] on her tax return for 2004. The itemized deduction includes taxes, home mortgage interests and points gifts, however, household living expenses include repayment of the mortgage loan principles, various insurance, automobile payment and maintenance, utilities, transportation and entertainments expenses in addition to the itemized deduction. It is not likely that the sole proprietor could meet her household's expenses in these aspects with [REDACTED] for the whole year of 2004. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2004.

In 2005, the petitioner paid the beneficiary a partial proffered wage of [REDACTED] and thus, the petitioner must demonstrate that the sole proprietor had sufficient adjusted gross income to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage and to cover the sole proprietor's household living expenses. The sole proprietor had adjusted gross income of [REDACTED] which was sufficient to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage. However, the record does not contain a statement of monthly living expenses for the sole proprietor's household. Without such a statement, the AAO cannot determine whether the balance of [REDACTED] after paying the beneficiary the difference between wages actually paid to the beneficiary and the full proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses for the year of 2006. Further, the AAO notes that the sole proprietor claimed itemized deduction of [REDACTED] on her tax return for 2005. Since the sole proprietor's adjusted gross income was not sufficient to cover the itemized deduction, it was not sufficient to cover the household living expenses. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2005.

In 2006, the petitioner paid the beneficiary a partial proffered wage of [REDACTED] and thus, the petitioner must demonstrate that the sole proprietor had sufficient adjusted gross income to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage and to cover the sole proprietor's household living expenses. The sole proprietor had adjusted gross income of [REDACTED] which was sufficient to pay the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage. However, the record does not contain a statement of monthly living expenses for the sole proprietor's household. Without such a statement, the AAO cannot determine whether the balance of [REDACTED] after paying the beneficiary the difference between wages actually paid to the beneficiary and the full proffered wage from the adjusted gross income cannot cover the sole proprietor's household living expenses for the year of 2006. Therefore, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household living expenses for 2006.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL in 2008, the petitioner failed to demonstrate that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her family's living expenses in all the relevant years.

USCIS will consider the sole proprietorship's income and the owner's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. On appeal, counsel submitted bank statements covering from January to December 2008 claiming the balance of the bank account for each month in 2008 was sufficient to pay the monthly proffered wage and monthly household living expenses for the sole proprietor.

If the accounts are savings accounts, money market accounts, certificates of deposits (CD), or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the accounts represent what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. The bank statements in the record show that the bank account (account number: [REDACTED]) is held by Victoria Regala, the sole proprietor, however, the account is a checking account, not a savings account, money market account, CD account or other similar account. Therefore, the funds cannot be considered as the sole proprietor's extra liquefiable assets in determining the petitioner's ability to pay the proffered wage in this case because these funds are most likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. In addition, although the statements do not clearly indicate that this checking account is the sole proprietor's business checking account, counsel did not submit any documentary evidence showing that this account is not for the sole proprietor's business or that the sole proprietor had other checking account(s) for her business. Therefore, the petitioner failed to establish its ability to pay the proffered wage as of the priority date with the sole proprietor's balances in her bank account as extra liquefiable assets.

On appeal, counsel also submitted statements of the sole proprietor's Retirement Plan Statement from Kaiser Permanente covering a period from January 1, 2008 to March 31, 2009 and Personal Portfolio Review for the sole proprietor's investment account with Ameriprise Financial covering a period from January 1, 2008 to July 31, 2009. These statements show that the sole proprietor had the balance of [REDACTED] in her retirement account and [REDACTED] in her investment account at the end of year 2008. The record does not contain detail information for the AAO to determine whether it is possible for the sole proprietor to withdraw significant funds from her retirement and investment accounts. The record does not contain any evidence showing that the sole proprietor is willing to withdraw significant funds from these accounts to pay the beneficiary the proffered wage. Without the specific documentation, the AAO finds that it is unlikely that the sole proprietor would withdraw significant funds from her personal investment and retirement accounts to pay the beneficiary's wage despite of early withdrawal penalties if any. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *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, even if the petitioner had established that the sole proprietor could and would be willing to withdraw all funds from these accounts to pay the beneficiary's wage, the AAO finds that the petitioner would still fail to establish the petitioner's ability to pay the proffered wage. The total balance in the sole proprietor's retirement and investment accounts at the end of 2008 were [REDACTED]. This amount was sufficient to pay the instant beneficiary the proffered wage of [REDACTED] for the year of the priority date in this matter. However, the record does not contain a statement of monthly living expenses for the sole proprietor's household.⁵ On appeal, counsel states that the personal monthly household recurring expense of the petitioner is [REDACTED] per month with additional [REDACTED] for extra expenses (ex. taxes). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Without such a statement, the AAO cannot determine whether the balance of [REDACTED] after paying the beneficiary the full proffered wage from the total balance in the retirement and investment accounts cannot cover the sole proprietor's household living expenses for the year of 2008. Therefore, the petitioner failed to establish that the sole proprietor had sufficient extra liquefiable assets to pay the instant beneficiary the proffered wage as well as to cover her household living expenses for 2008.

Furthermore, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the ETA Form 9089 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

USCIS records indicate that the petitioner has at least one Immigrant Petition for Alien Worker (Form I-140) currently pending with the AAO on appeal.⁶ Therefore, the petitioner must also show that it paid the beneficiary of the pending appeal case the proffered wage for 2008 to the present or

⁵ The record contains a statement of the sole proprietor's household expenses for 2007. The statement for 2007 cannot replace the one for 2008. Furthermore, as the director discussed in his decision, the statement of the sole proprietor's household expenses for 2007 contains significant inconsistencies with the sole proprietor's tax return for 2007, and therefore, USCIS cannot accept and consider it as part of evidence in determining the petitioner's ability to pay the proffered wage as well as to cover the sole proprietor's household living expenses.

⁶ [REDACTED] was filed for Ocampo on September 24, 2007 with the priority date of March 7, 2002 and the appeal from denial of the petition is pending with the AAO as of this date.

the sole proprietor had sufficient adjusted gross income to pay the proffered wage to the beneficiary of this pending petition for 2008 through the present. *See* 8 C.F.R. § 204.5(g)(2). As previously mentioned, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage as well as to cover the sole proprietor's household living expenses for 2008 with the total balance of [REDACTED] in the sole proprietor's retirement and investment accounts at the end of that year. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary and the other beneficiary of the pending petition the proffered wages as well as to cover the sole proprietor's household living expenses for 2008.

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. *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 [REDACTED]. 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 *Sonogawa*, 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 failed to submit the required initial evidence to establish the petitioner's ability to pay, such as the sole proprietor's annual report, tax return or audited financial statements, for the year of the priority date; the petitioner failed to submit the sole proprietor's savings accounts, money market accounts, CD accounts or other similar accounts to demonstrate that the sole proprietor had extra liquefiable assets to establish the petitioner's ability to pay, the petitioner failed to submit a statement of the sole proprietor's household living expenses for 2008 onwards, and therefore, the petitioner failed to establish the petitioner's ability to pay the instant beneficiary and other beneficiary the proffered wages for all relevant years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all these years from 2008 to the present were uncharacteristically unprofitable years for the petitioner. In addition, given the record as a whole, the petitioner's history of filing

immigrant petitions,⁷ the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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.

Counsel's assertions and evidence submitted on appeal cannot overcome the grounds of denial in the director's July 29, 2009 decision. The petitioner failed to establish its continuing ability to pay all proffered wages as well as to cover the sole proprietor's household living expenses as of the priority date. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.

⁷ The petitioner claims on the petition that it has three employees. However, until recently, it has the three immigrant petitions are pending with the AAO on appeal.