

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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**

PUBLIC COPY

B6

FILE: [REDACTED]
SRC 08 800 06354

Office: TEXAS SERVICE CENTER Date: FEB 16 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

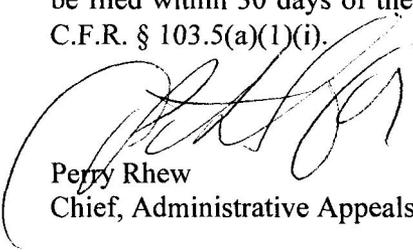
PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant
to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 203 (b)(3)

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 or reopen, 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. The director dismissed a subsequent motion to reopen. The petitioner filed an appeal which was erroneously treated as untimely by the director. The petitioner filed a motion to reconsider. The Administrative Appeals Office (AAO) will withdraw the director's April 28, 2009, decision determining that appeal was untimely and will assume jurisdiction. The appeal is dismissed and the petition remains denied.

The petitioner performs automotive cosmetic mobile reconditioning. It seeks to employ the beneficiary permanently in the United States as an auto detailing supervisor.

Although required by statute, a complete Form ETA 750 Application for Alien Employment Certification, approved by the Department of Labor (DOL), did not accompany the petition. A complete Part B of the Form ETA 750, signed by the alien, was not provided with the petition. *See* 8 C.F.R. § 204.5(a)(2). As such, the petition is not eligible for approval.

The director denied the petition on December 22, 2008. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

The petitioner filed a motion to reopen this decision on January 26, 2009, submitting additional financial documentation related to the petitioner's ability to pay the proffered salary. On February 10, 2009, the director dismissed this motion to reopen, finding that the grounds for denial of the decision had not been overcome. The petitioner filed an appeal to this decision on March 13, 2009. The director erroneously treated this appeal as untimely and rejected it on April 28, 2009. On June 5, 2009, the petitioner filed a motion to reconsider the director's April 28, 2009. The AAO will withdraw the director's decision of April 28, 2009 and treat the appeal as timely filed since it was filed within 33 days¹ and consider the petitioner's ability to pay the proffered wage based on the record as it currently stands.

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 procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified

¹*See* 8 C.F.R. § 103.3(a)(2).

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001.² The proffered wage is stated as \$18.81 per hour, which amounts to \$39,124.80 per year. As the complete Part B of the Form ETA 750 was not provided and attested to by the beneficiary under penalty of perjury, his employment history, including when he began employment with the petitioner, is unclear.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on January 11, 2008, it is claimed that the petitioner was established on November 11, 1996, reports gross annual income of \$600,000, net annual income of \$75,100 and employs twenty-nine workers.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's

² 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, including a prospective U.S. employer's ability to pay the proffered wage is clear.

proffered wages, although the overall 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 support of its ability to pay the proffered wage of \$39,124.80 the petitioner initially provided copies of its 2002, 2003, 2004 and 2005 Form 1120S, U.S. Income Tax Return(s) for an S Corporation. The petitioner subsequently provided copies of its 2006 and 2007 tax returns. They indicate that the petitioner, a corporation, was incorporated on November 15, 2000. They reflect that its fiscal year is a standard calendar year. The tax returns contain the following information:

Year	2002	2003	2004
Net Income ³	-\$ 3,704	-\$ 4,393	-\$1,438
Current Assets	\$ 2,792	\$ none	\$ 2,647 (taken from 2005)
Current Liabilities	\$ none	\$ none	\$ none
Net Current Assets	\$ 2,792	\$ none	\$ 2,647
	2005	2006	2007
Net Income	\$ 1,784	\$22,013	\$26,873
Current Assets	\$ 4,431	\$ 7,304	\$ 7,808
Current Liabilities	\$ none	\$ none	\$ none
Net Current Assets	\$ 4,431	\$ 7,304	\$ none

It is noted that the petitioner failed to provide either a tax return, audited financial statement or annual report for 2001, pursuant to 8 C.F.R. § 204.5(g)(2). A subsequent Internal Revenue receipt indicates that the petitioner requested a copy of its 2001 tax return on March 6, 2009.

³Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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) or line 17e (2004, 2005) and line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 21 of page one on its 2002 corporate tax return because although credits, deductions and adjustments appear on Schedule K, no figure is stated on line 23. On the 2003 tax return, net income appears on line 23 of Schedule K, on line 17e of Schedule K in 2004, line 21 of page one in 2005, and line 18 in 2006 and 2007.

Further, the beginning-of-year figure on line 1 of Schedule L of the 2006 tax return does not match the end-of-the year figure shown on line 1 of Schedule L for 2005. No explanation for this discrepancy has been provided. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, to the extent that any figures are stated, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁵

The petitioner has also provided: 1) a copy of two documents on the letterhead of [REDACTED] giving the same address as the petitioner that reflect "we owe" stamped on them, but with the exception of some figures, reflect no name to who any monies are owed and no date; 2) a copy of an August 23, 2002, Internal Revenue (IRS) notification that the beneficiary was assigned an individual taxpayer identification number of [REDACTED]; and 3) copies of internal payroll records showing the following wages paid to the beneficiary:

- a) \$7,612.27 as of November 23, 2002;
- b) \$28,712.65 as of December 13, 2003;
- c) \$29,705.24 as of October 30, 2004;
- d) \$26,515.79 as of October 29, 2005;
- e) \$17,123.80 as of October 28, 2006;
- f) \$18,493.89 as of September 1, 2007;
- g) \$26,084.70 as of December 13, 2008; and

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

⁵ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

- h) \$1,051 added to 2008 earnings as of December 27, 2008 totaling \$27,135.70 earnings as of December 27, 2008.

The petitioner additionally submitted copies of two Wage and Tax Statements for 2006 and 2007, respectively. In 2006, the W-2 reflects that the petitioner paid the beneficiary \$21,428.03 and in 2007, the wages paid are shown as \$27,134.49.

In a January 22, 2009, letter from [REDACTED] who the petitioner asserts is its sole shareholder, [REDACTED] states that the beneficiary has been working for the petitioning corporation since October 1998 and had been paid in cash with a report on a "we owe" form from [REDACTED] prior to his receipt of an IRS identification number. [REDACTED] states that he has been unable to obtain the 2001 corporate tax return as the preparer has gone out of business. He further states that he withdraws funds from the petitioner as officer compensation and that if the beneficiary had permanent residence, he would have been paid the deficiency in wages. In support of this argument, counsel submits copies of [REDACTED] individual income tax returns showing 2004 wages paid of \$102,400 with reported adjusted gross income of \$47,962; 2005 wages paid of \$62,400 in 2005 with \$61,963 reported as adjusted gross income; and \$31,200 wages paid in 2006 with \$50,620 reported as adjusted gross income.

Counsel asserts that the beneficiary has worked for the petitioner since 1998 and has received increased wages through the years. Counsel maintains that [REDACTED] had the ability to pay any difference between the beneficiary's wages and the proffered wage out of officer compensation. Relying on *Matter of Sonogawa, supra*, counsel asserts that the petition should be approved based on the petitioner's reasonable expectation of increased profits.

In this case, counsel's assertions are not persuasive. The petitioner has not established its continuing ability to pay the proffered wage of \$39,124.80 per year. It is noted that if a 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, based on the documents provided to the record, and as calculated from the petitioner's pertinent payroll records, the following wages paid and the difference from the proffered wage are reviewed herein as:

Year	Wages Paid	Difference from Proffered Wage of \$39,124.80
2001	not established	n/a
2002	\$7,612.27	-\$31,512.53

2003	\$28,712.65	-\$10,412.15
2004	\$29,705.24	-\$9,419.56
2005	\$26,515.79	-\$12,609.01
2006	\$21,428.03	-\$17,696.77
2007	\$27,134.49	-\$11,990.31
2008	\$27,135.70	-\$11,989.10

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses. *See 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 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.

With respect to depreciation as claimed by counsel, 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).

In this case, it is noted that the priority date as sought by the petitioner and as reflected on the ETA 750 was April 30, 2001. The petitioner failed to provide credible evidence of wages paid to the beneficiary in this year and failed to provide a corporate federal tax return, audited financial statement or an annual report (supported by audited financial statements) in compliance with 8 C.F.R. § 204.5(g)(2). The fact that the preparer went out of business does not exempt the petitioner from demonstrating its ability to pay the proffered wage in the year of filing. Nor does requesting such a tax return in 2009 mitigate this requirement. Additionally, as noted above, Schedule L of the 2006 tax return is inconsistent with the figures shown on Schedule L of the 2005 tax return and is therefore unreliable. These figures will not be considered.

As set forth above, the petitioner has not demonstrated its ability to pay the proffered wage in 2001.

In 2002, the shortfall between the wages paid to the beneficiary of \$7,612.27 and the proffered wage of \$39,124.80 was \$31,512.53. This shortfall could not be covered by either the corporate petitioner’s net income of -\$3,704 or its net current assets of \$2,792.

In 2003, the shortfall between the wages paid to the beneficiary and the proffered wage was \$10,412.15. The petitioner’s net income of -\$4,393 as shown on its 2003 tax return could not cover this shortfall. As reflected on Schedule L of 2003, the petitioner claimed no current assets and no current liabilities.

In 2004, the difference of \$9,419.56 between the wages of \$29,705.24 shown to be paid to the beneficiary and the proffered wage could not be met by either the petitioner’s reported net income of -\$1,438 or its net current assets of \$2,647.

In 2005, the difference of \$12,609.01 between the wages shown to be paid to the beneficiary and the proffered wage could not be covered by either the petitioner’s net income of \$1,784 or its net current assets of \$4,431.

In 2006, the wages shown to be paid to the beneficiary were \$21,428.03. The difference from the proffered wage is \$17,696.77. This amount could be met by the petitioner’s net income reported that year.

In 2007, the wages shown to be paid to the beneficiary were \$27,134.49. The difference from the proffered wage is \$11,990.31. This amount could be met by the petitioner's reported net income of \$26,873.

As no other financial information was provided for 2008, other than the petitioner's payroll record showing \$27,135.70 paid to the beneficiary, it may not be concluded that the petitioner could cover the \$11,989.10 shortfall between the proffered wage and the wages paid to the beneficiary in that year.

As set forth above, the corporate petitioner established that it could pay the proffered wage in 2006 and 2007 but failed to demonstrate that it could pay the certified wage in 2001, 2002, 2003, 2004, 2005 or 2008.

In this case, we decline to consider officer compensation paid to [REDACTED] as applicable toward the corporate ability to pay the proffered wage. It is noted that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not ordinarily be considered to be an available source with which to pay the beneficiary. Here, it is unclear, how many additional duties performed by [REDACTED] as the president and owner of the corporate petitioner are going to be assumed by the beneficiary when it is claimed that the beneficiary has already been employed full-time as an auto detailing supervisor. Further, in 2004, the \$9,419.56 difference between the proffered wage and the actual wages paid to the beneficiary would represent a 20 percent reduction of [REDACTED] reported adjusted gross income of \$47,962 in that year and would not be reasonable to permit such an accommodation even it were otherwise justified. Similarly, in 2005, his adjusted gross income of \$61,963 would have been reduced approximately 20 percent toward covering the difference of \$12,609.01 between the beneficiary's actual wages and the proffered wage. Moreover, it is unclear what other personal expenses [REDACTED] incurs on an annual basis in those years and in 2002 and 2003 before considering any application of personal income paid as officer compensation to the corporate petitioner's ability to pay. Further, with respect to 2002 and 2003, it is noted that no individual tax return was supplied or other documentation to identify how much of [REDACTED] personal income would have been reasonably available even if other factors had been established. 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).⁶

⁶ Even if we accepted the assertions relevant to the reduction of officer compensation, there is still no evidence for 2001, the priority year, to show the ability to pay the certified wage. It is further noted that the record contains no corroboration, such as in the submitted tax returns, that [REDACTED] has been the sole shareholder of the petitioning corporation during the period from 2001 to the present.

Counsel relies on *Matter of Sonegawa, supra* in contending that the petition should be approved based on the petitioner's overall circumstances. Counsel also cites *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D. Mass. Sept. 29, 1987)(unpublished) for the proposition that [USCIS] erred in failing to consider a petitioner's personal assets in determining the employer's ability to pay the proffered wage. However, the *O'Conner* court specifically distinguished the facts in its case because the petitioning business was reported on Schedule C of the individual owner's tax return. The AAO concurs that where a business is structured as a sole proprietorship and reported on Schedule C, Profit of Loss from Business of an individual income tax return, the personal assets and liabilities of the sole proprietor may be considered because they are legally indistinguishable from the business assets. However, in this case, the petitioner is a corporation. 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). In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court 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."

Matter of Sonegawa, is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

It is noted that although it is claimed that the petitioner has employed the beneficiary since 1998, no first-hand evidence of this employment has been provided. Further, the tax returns indicate that the petitioner incorporated in 2000, approximately five months prior to the filing of the application for alien labor certification. Further, in four out of the six corporate tax returns submitted to the record, not including 2001, which was not provided at all, both net income and net current assets figures are all substantially less than the difference between the beneficiary's actual wages paid and the proposed wage offer. It may not be concluded that such analogous circumstances to *Sonegawa* are present in this case that would overcome the evidence reflected in the tax returns. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA

1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. The AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision of April 28, 2009 is withdrawn. The appeal is dismissed, and the petition remains denied.