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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

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **NOV 10 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 was before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a board and care provider. It seeks to employ the beneficiary permanently in the United States as a caregiver 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 a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioning corporation failed to establish its ability to pay the proffered wage with the corporation's net income or net current assets from the priority date through the present, 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 January 23, 2009 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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). The AAO notes that the petitioner filed a motion to reconsider with the director prior to the instant appeal on the basis of ineffective assistance of counsel and will adjudicate the instant appeal on its merits.

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 instant 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 26, 2004. The proffered wage as stated on the Form ETA 750 is \$7.96 per hour (\$16,556.80 per year). On the petition, the petitioner claims to have been in the business since 1998, to have a gross annual income of \$171,908 and three employees. On the Form ETA 750B signed by the beneficiary on July 14, 2004, he did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, both the labor certification application and the petition were filed by the petitioner under the name of [REDACTED] 2004 and November 2007 respectively. With the initial filing of the petition, counsel submitted Form 1040, U.S. Individual Income Tax Return filed by [REDACTED] for 2004, Form 1120-A, U.S. Corporation Short-Form, Income Tax Return for 2004 and 2005 and Form 1120, U.S. Corporation Income Tax Return for 2006 filed by [REDACTED] Inc. as evidence to establish the petitioner's ability to pay the proffered wage from the priority date to the present. In response to the director's request for evidence (RFE) on December 1, 2008 and on appeal, counsel asserts that the petitioner was a sole proprietorship owned by the sisters [REDACTED] and [REDACTED]. They incorporated the business into [REDACTED] on September 21, 2004. The record contains corporate documents and the owners' individual tax returns in support with counsel's assertions. However, counsel did not explain why the instant petition was filed by the petitioner using the name of the old sole proprietorship on November 19, 2007 when the sole proprietorship had already been incorporated into [REDACTED] as a corporation. Upon a careful review of all documentary evidence in the record, the AAO concludes that [REDACTED] is a successor-in-interest to Favic Board and Care, and the petitioning entity was a

sole proprietorship in 2004 and has been a corporation since 2005. The successor-in-interest must not only establish its ability to pay the proffered wage from the time the successorship established to the present, but also establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). *Matter of Dial Auto* is an AAO decision designated as precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Therefore, the petitioner in this matter must establish that the sole proprietors paid the beneficiary the full proffered wage or that they had sufficient adjusted gross income and/or other liquefiable assets to pay the proffered wage as well as to support their family for 2004. The petitioner must also establish that the corporation as the successor-in-interest paid the beneficiary the full proffered wage in 2005 onwards or that it had sufficient net income or net current assets to pay the full proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage from 2005 to the present.

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 such as the beneficiary's W-2 or 1099 forms, or paystubs showing that the predecessor proprietors paid the beneficiary a full or partial proffered wage in 2004. However, the record contains the beneficiary's W-2 form for 2007 which shows that the successor corporation paid the beneficiary \$14,400 in 2007. Therefore, the petitioner failed to demonstrate that the predecessor proprietors paid the beneficiary the proffered wage in 2004 and the successor corporation paid full proffered wage from 2005 to the present, and thus, the petitioner must demonstrate that the predecessor proprietors had sufficient adjusted gross income to pay the beneficiary the full proffered wage as well as to support their household in 2004; and the petitioner must also demonstrate that the successor corporation had sufficient net income or net current assets to pay the beneficiary the full proffered wage in 2005 and 2006 and the difference of \$2,156.80 in 2007 between wages actually paid to the beneficiary and the proffered wage respectively.

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. For a sole proprietorship, 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. Individuals report their and their households' income on their individual (Form 1040) federal tax return each year. 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.

For a corporation, USCIS will 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 total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

As alternate method, USCIS also reviews the corporate petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end

² 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,

current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. 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.

As previously discussed, the petitioner was in the form of sole proprietorship in 2004, and therefore, the petitioner must establish its ability to pay the proffered wage for that year through first examination of the sole proprietors' adjusted gross income in determining whether the adjusted gross income was sufficient to pay the proffered wage and to support their households. The record contains Form 1040 U.S. Individual Income Tax Returns filed by the two proprietors for 2004 through 2007. However, the sole proprietors' tax returns for 2005 through 2007 are not necessarily dispositive because only in 2004 the petitioner was in the form of a sole proprietorship and need to establish its ability to pay the proffered wage with the sole proprietors' gross adjusted income. The sole proprietors' tax returns for 2004 show the following financial information concerning their ability to pay the proffered wage that year:

- Form 1040 for [REDACTED] stated adjusted gross income³ of \$6,636.
- Form 1040 for [REDACTED] stated adjusted gross income of \$17,833.

The tax return shows that [REDACTED] needs to support only herself and that [REDACTED] has a family of two to support, however, all of them live at the same address. The record also contains the sole proprietors' monthly household expenses statements for 2004 and 2005. The 2004 monthly expenses statement states that total monthly expenses for the sole proprietors' household were \$10,036.75 per month, approximately \$120,441 in the year of 2004. The household expenses include mortgage payment of \$5,450.09, credit card payments of \$1,590.05, cash (food/groceries) expenses of \$1,035.70, personal (clothing, entertainment) of \$395.28, water & electricity of \$250.15, gas for household of \$100.25, telephone of \$259.86, trash of \$16.66, repair/maintenance of \$626.95, and automobile expenses of \$875.42. The sole proprietors had total adjusted gross income of \$24,469 in 2004 which was even insufficient to cover the household expenses. Therefore, the sole proprietors did not have sufficient adjusted gross income to pay the proffered wage as well as to support their family of three in 2004 and thus, the petitioner failed to establish its ability to pay the proffered wage for 2004.

USCIS considers the sole proprietors' liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, counsel submitted statements of the sole proprietors'

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.

³ For a sole proprietorship, USCIS considers net income to be the figure shown on Form 1040, U.S. Individual Income Tax Return, Line 36, adjusted gross income.

home equity line of credit account. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the business's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the business entity's assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the business's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also submitted the sole proprietors' home mortgage loan statements as evidence of additional liquefiable assets for the petitioner to establish the ability to pay the proffered wage. Regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. 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).

Therefore, the petitioner failed to establish its ability to pay the beneficiary the proffered wage as well as to cover the sole proprietors' household expenses in 2004 when it was in the form of a sole proprietorship.

The evidence in the record shows that the petitioner was incorporated as a C corporation on September 21, 2004 and filed its tax returns on Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2004 and 2005, and on Form 1120, U.S. Corporation Income Tax Return for 2006. These tax returns demonstrate the following financial information concerning the petitioner's ability to pay the beneficiary the proffered wage of \$16,556.80 per year from September 21, 2004:

- In 2004,⁴ the Form 1120-A stated a net income⁵ of (\$370) and net current assets of \$0.
- In 2005, the Form 1120-A stated net income of (\$819) and net current assets of \$0.
- In 2006, the Form 1120 stated net income⁶ of (\$9,929) and net current assets of \$0.
- In 2007, the Form 1120 stated net income of \$4,748 and net current assets of \$0.

For 2004, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the proffered wage, and thus, failed to establish its ability to pay the beneficiary the proffered wage for the period from September 21 to the end of the year in 2004. For 2005 through 2007, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the proffered wage, and thus, failed to establish its ability to pay the beneficiary the proffered wage for each of these years.

Therefore, from the date the petitioner was incorporated in September 2004, the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wages through examination of wages paid to the beneficiary and the petitioner's net income or net current assets.

On appeal, counsel asserts that the shareholders' personal income and assets should be considered in determining the petitioner's ability to pay the proffered wage in this case and submitted the two shareholders' individual income tax returns and letters from banks regarding their bank account balances. Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See Matter of M, 8 I&N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In the instant case, the petitioner was in the form of sole proprietorship before, however, the petitioner was incorporated on September 21, 2004. Because the corporation is a separate and distinct legal entity from its owners and shareholders, [REDACTED] their assets cannot be considered in determining the petitioning corporation's ability to pay the proffered wage

⁴ The Form 1120-A does not specifically indicate the tax filing period, however, considering the corporation was formed on September 21, 2004, the AAO assumes that the petitioner's 2004 tax return was filed for a period from September 21 to December 31, 2004.

⁵ Taxable income before net operating loss deduction and special deductions on Line 24 of the Form 1120-A.

⁶ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

from September 2004 to the present. Counsel's reliance on shareholders' personal assets to establish the petitioning corporation's ability to pay the proffered wage is misplaced.

Moreover, 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 or approved 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 and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter 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 Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, USCIS records show that the petitioner filed two additional Form I-140 Immigrant Petitions for Alien Worker (both were approved).⁷ Therefore, the petitioner was obligated to demonstrate its ability to pay two proffered wages in 2004 and 2005. The record does not contain any documentary evidence showing that the petitioner paid the additional beneficiary any compensation in 2004 and 2005. As previously discussed, the sole proprietors (when the petitioner was in the form of sole proprietorship) did not have sufficient adjusted gross income to pay a single proffered wage as well as to cover the household's expenses for 2004, and thus, the petitioner failed to establish its ability to pay all two proffered wages that year. The petitioning corporation did not have sufficient net income or net current assets to pay a single proffered wage in 2005 through 2007, and thus it failed to establish its ability to pay all two proffered wages these years.

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 \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included [REDACTED] movie actresses, and society matrons. The petitioner's clients had

⁷ The detail information about the two approved petitions is as follows:

- [REDACTED] on May 19, 2000 with the priority date of September 24, 1997 and approved on January 22, 2001. The beneficiary was adjusted to lawful permanent resident status on September 13, 2002.
- [REDACTED] on January 16, 2003 with the priority date of January 22, 2001 and approved on October 27, 2003. The beneficiary was adjusted to lawful permanent resident status on April 18, 2005.

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

In the instant case, the petitioner whether in the form of sole proprietorship or corporation failed to establish its ability to pay a single proffered wage for any relevant year. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the four years from 2004 to 2007 were uncharacteristically unprofitable years for the petitioner. In addition, given the record as a whole, the petitioner's history of filing immigrant petitions, 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.

The petitioner's assertions and new evidence submitted on appeal cannot overcome the ground of denial in the director's January 23, 2009 decision. The petitioner failed to establish that it had the continuing ability to pay all proffered wages beginning on the priority date and continues to the present. 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.