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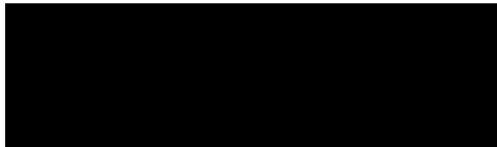
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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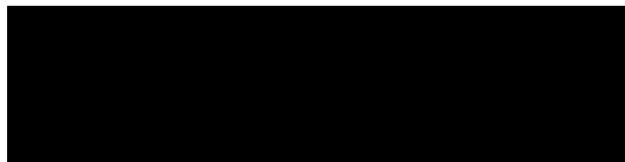
Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a producer, importer, and retailer of decorative ceramic tableware, cookware, pottery, and linen. It seeks to employ the beneficiary permanently in the United States as a warehouse inventory clerk. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's July 22, 2010 denial, the single 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 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 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.

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 March 15, 2004. The proffered wage as stated on the Form ETA 750 is \$7.05 per hour based upon a 35 hour work week, or \$12,831.00 annually. The

Form ETA 750 states that the position requires no education, no training, and one year of experience in the offered job.

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.<sup>1</sup>

Relevant evidence in the record includes cancelled checks allegedly representing payments from the petitioner to the beneficiary from February 2004 to October 2008, summaries of monthly salary allegedly paid by the petitioner to the beneficiary in 2004, 2005, 2006, 2007, and 2008, the petitioner's monthly bank statements from 2004 to 2008, and the petitioner's Form 1065, U.S. Return for Partnership Income, for 2004, 2005, 2006, 2007, and 2008.

On appeal, counsel asserts that the summaries of monthly salary paid by the petitioner to the beneficiary in 2004, 2005, 2006, 2007, 2008, and 2009 and cancelled checks representing payments from the petitioner to the beneficiary from 2004 to 2009 establish the petitioner's continuing ability to pay the proffered wage. Counsel includes copies of previously submitted documents as well as articles and pictorials in various publications regarding the petitioner's business and products, a summary of checks paid to the beneficiary in 2009, cancelled checks representing payments from the petitioner to the beneficiary in 2009, and the petitioner's monthly bank statements for 2009, the petitioner's Form 1065 tax return for 2009.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on the Form 1065.<sup>2</sup> On the petition, the petitioner claimed to have been established on July 24, 1997 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 750, signed by the beneficiary on November 25, 2003, the beneficiary claimed to have worked for the petitioner since March 2001.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations 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).

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided photocopies of cancelled checks reflecting payments made to the beneficiary as follows:

- 2004 – \$16,266.50.
- 2005 – \$15,425.00.
- 2006 – \$11,180.50 (\$1,650.90 less than the proffered wage of \$12,831.40).
- 2007 – \$19,703.00.
- 2008 – \$21,078.00.
- 2009 – \$10,268.00 (\$2,563.40 less than the proffered wage of \$12,831.40).

However, the cancelled checks are not persuasive evidence of any wages having been paid to the beneficiary because the petitioner did not list the payments as salary and wages paid to employees other than to partners on line 9 of the petitioner's Form 1065 tax returns 2004, 2005, 2006, 2007, 2008, and 2009 or anywhere else on the tax returns. In addition, the petitioner acknowledged that such payments were not subject to Social Security withholding taxes and had not been reported to the Internal Revenue Service (IRS) or [REDACTED] authorities because the beneficiary did not possess a Social Security number and was only recently assigned a Taxpayer Identification Number by the IRS on June 1, 2009. Further, the payments are not reflective of a commercially viable employer-employee relationship because the payments range from a minimum of \$50.00 to a maximum of \$890.00 and include the following irregularities: three checks dated September 15, 2005, two for \$330.00 and one for \$320.00; four checks dated May 17, 2007, two for \$315.00, one for \$320.00, and one for \$365.00; four checks all dated June 28, 2007, two for \$320.00, one for \$50.00, and one for \$360.00; four checks all dated August 2, 2007, one for \$230.00, one for \$250.00, one for \$330.00, and one for \$335.00; three checks all dated December 26, 2007, one for \$250.00, one for \$384.00, and one for \$408.00; three checks dated March 17, 2008, two for \$420.00 and one for \$372.00; and, three checks dated November 10, 2009 all for \$300.00. The record is absent any explanation from the petitioner as to why the beneficiary, purportedly a full-time employee working thirty five hours per week and being paid an hourly wage of \$7.05, would receive such disparate

payments in such an irregular fashion. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the cancelled checks as persuasive evidence of “wages” paid to the beneficiary. Although it appears funds were provided to the beneficiary, the record does not establish that these checks represent “wages.”

Nevertheless, assuming the cancelled checks are persuasive evidence, these cancelled checks demonstrated that the petitioner paid the beneficiary an amount at least equal to the proffered wage in 2004, 2005, 2007, and 2008, but failed to establish that it paid the beneficiary the full proffered wage of \$12,831.40 in 2006 and 2009. Thus, the petitioner would only be obligated to show that it could pay the difference between the proffered wage and wages already paid in 2006 and 2009. However, as the cancelled checks do not appear to represent wage payments, the petitioner must establish that it could pay the proffered wage through its net income or net current assets.

It must be noted that the petitioner submitted canceled checks reflecting payments made by Bulgar U.S.A., Inc., to the beneficiary in 2004 and 2005. A review of the website at [REDACTED] reveals that [REDACTED] is a different corporate entity than the petitioner. Therefore, any wages or compensation paid by [REDACTED] will not be considered in determining whether the petitioner has established the continuing ability to pay the proffered wage to the beneficiary since the priority date. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 wage expense is misplaced. 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 118. “[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 *K.C.P. Food*, 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 the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record contains the petitioner’s Form 1065 tax returns for 2004, 2005, 2006, 2007, 2008, and 2009. The petitioner’s tax returns stated its net income as follows:

- In 2004, Schedule K of the petitioner’s Form 1065 stated net income<sup>3</sup> of <\$67,779.00>.<sup>4</sup>

<sup>3</sup> For an LLC, where an LLC’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s Schedules K have relevant entries for additional deductions in 2004, 2006, 2007, 2008, and 2009 and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other

- In 2005, the petitioner's Form 1065 stated net income of <\$63,163.00>.
- In 2006, Schedule K of the petitioner's Form 1065 stated net income of <\$49,671.00>.
- In 2007, Schedule K of the petitioner's Form 1065 stated net income of <\$69,833.00>.
- In 2008, Schedule K of the petitioner's Form 1065 stated net income of \$4,773.00.
- In 2009, Schedule K of the petitioner's Form 1065 stated net income of <\$9,270.00>.

Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage in 2004 through 2009. Assuming the persuasiveness of the wage evidence, the petitioner did not establish that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage for the years 2006 and 2009.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> An LLC's year-end current assets (if filing as a partnership) 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 15(d) through 17(d). If the total of an LLC's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2004, the petitioner's Form 1065 stated net current assets of <\$36,958.00>.
- In 2005, the petitioner's Form 1065 stated net current assets of <\$69,242.00>.
- In 2006, the petitioner's Form 1065 stated net current assets of <\$128,394.00>.
- In 2007, the petitioner's Form 1065 stated net current assets of <\$197,297.00>.
- In 2008, the petitioner's Form 1065 stated net current assets of <\$185,878.00>.
- In 2009, the petitioner's Form 1065 stated net current assets of <\$162,256.00>.

Therefore, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage in 2004 through 2009. Assuming the persuasiveness of the wage evidence, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage for the years 2006 and 2009.

The petitioner provides monthly bank statements for 2009 from [REDACTED] for a \$50,000.00 business line of credit. However, in calculating the ability to pay the proffered salary,

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financial statement, a loss.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A limit on a credit card cannot be treated as cash or as a cash asset. Further, 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. 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 a tax return or audited financial statement and will be fully considered in the evaluation of the net current assets of the business. 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 firm'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). Here, as the evidence of this line of credit has not been submitted in the context of audited financial statements, their availability to pay the proffered wage has not been established.

Counsel also provides the petitioner's monthly statements from February 2004 through January 2008 for a business banking account held initially by [REDACTED] and subsequently at [REDACTED], as well as the petitioner's monthly statements from December 2006 through December 2009 for another separate business checking account held by [REDACTED]. Regardless, the petitioner's business checking accounts represent cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than readily available assets that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in these accounts are variable with balances fluctuating above and well below the proffered wage. Finally, the bank records are incomplete as many of the statements are missing pages. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, as explained above, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the

petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered when determining the petitioner's net current assets. Therefore, the AAO will not consider the petitioner's bank statements when evaluating the petitioner's continuing ability to pay the proffered wage to the beneficiary.

On appeal, counsel asserts that the summaries of monthly salary paid by the petitioner to the beneficiary in 2004, 2005, 2006, 2007, 2008, and 2009, representing payments from the petitioner to the beneficiary from 2004 to 2009, establish the petitioner's continuing ability to pay the proffered wage. However, the summaries of monthly salary paid to the beneficiary list sums that exceed the totals for the cancelled checks made payable to the beneficiary in 2004, 2005, 2006, and 2009, and list sums that are less than the totals for the cancelled checks in 2007 and 2008. As such, these summaries of monthly salary cannot be considered as accurate.

Thus, from the date the ETA Form 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *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 this matter, no specific detail or documentation has been provided similar to *Sonogawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are persuasive in this matter. The AAO cannot conclude that the petitioner has established it has had the continuing ability to pay the proffered wage. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.