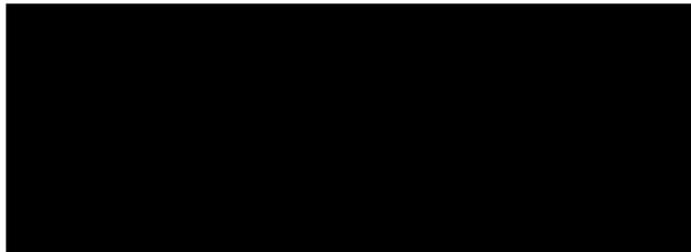


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

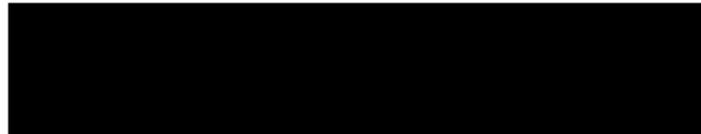


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Date: **AUG 10 2012** Office: TEXAS SERVICE CENTER

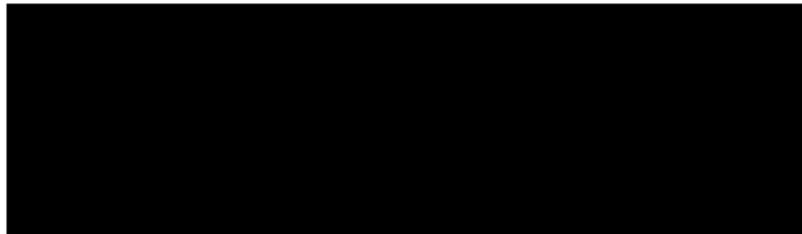
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for
Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner was a supermarket and is now a management company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A). As required by statute, the petition is accompanied by 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 the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made 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 denial dated July 14, 2008, 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)(i) of the Act, 8 U.S.C. Section 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the capital ETA Form 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

In the instant case, the priority date is April 30, 2001. The proffered wage as stated on the ETA Form 750 is \$17.51 per hour or \$36,420.80 annually.¹ The ETA Form 750 states that the position requires two years of experience in the job offered.

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.²

The evidence in the record of proceeding reveals that the petitioner is the business entity, Bongiorno Supermarket, Inc., a C corporation with Federal Employer Identification Number (FEIN), 06-0846919. The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, at part 5, section 2 that it was a supermarket established in 1967 and currently (at the time of filing in July 2007) employed 18 workers. According to the tax returns in the record, the petitioner's fiscal year runs from March 1 of each respective year through February 28 of the successive year. On the ETA Form 750 signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

In an attempt to demonstrate its continuing ability to pay the proffered wage since the priority date, the petitioner, [REDACTED] included copies of its Forms 1120, U.S. Corporate Income Tax Return, for the years from 2000 to 2006, as well as the Forms 1065, U.S. Return of Partnership Income, of the partnership, [REDACTED], with [REDACTED], for 2002, 2006, and 2007.

On appeal, counsel asserted that the petitioner's ability to pay the proffered wage since the priority date should be viewed in light of the totality of the circumstances as outlined in *Matter of Sonogawa*, 12 I.&N. Dec. 612 (Reg. Comm. 1967). Counsel indicated that the petitioner's officers would be willing to forego compensation in order to pay the proffered wage. Counsel argued that the petitioner's depreciable assets should not be considered a loss, but rather should be included in the petitioner's income when determining the petitioner's ability to pay the proffered wage. Counsel included copies of previously submitted documents in support of the appeal.

The AAO issued a Request for Evidence (RFE) on February 9, 2011, as well as a separate Notice of Derogatory Information/Request for Evidence (NDI/RFE) on August 1, 2011, to the petitioner and counsel requesting additional evidence in support of the Form I-140 petition.

In response to the RFE issued on February 9, 2011, counsel submitted a statement in which he contended that the assets of the petitioner, [REDACTED], and related business

¹ The AAO notes that the director incorrectly indicated in his decision that the proffered wage is \$36,452.00 per year.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). 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).

entities, [REDACTED] and [REDACTED] should be considered in determining the petitioner's continuing ability to pay the proffered wage. Counsel submitted affidavits from [REDACTED] and [REDACTED] a letter from the petitioner's accountant, the petitioner's [REDACTED] with [REDACTED] Form 1120 tax returns for 2007, 2008, and 2009, the Form 1065 tax returns for the partnership, [REDACTED] with [REDACTED], for the years from 2000 through 2009, and the Form 1065 tax returns for the partnership, [REDACTED], with [REDACTED] for the years from 2000 through 2009.

In response to the NDI/RFE issued on August 1, 2011, counsel asserts that the petitioner, [REDACTED] Supermarket, Inc., is an active business that continues to intend to employ the beneficiary in the proffered position of bookkeeper. Counsel acknowledges that the petitioner, [REDACTED] Supermarket, Inc., initially operated only a supermarket, but explains that over the years the petitioner acquired real estate and opened other businesses, including a gas station, liquor store, and car wash. Counsel states that the petitioner, [REDACTED], continues to operate these retail stores and provide payroll, bookkeeping, and business management services to the related business entities, [REDACTED], and [REDACTED]. Counsel submits photocopied photographs of its business operations and the Forms 1040, U.S. Individual Income Tax Return, of [REDACTED] for 2009 and 2010.

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 Sonogawa*, 12 I&N Dec. 612.

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 record contains no evidence that the beneficiary has ever been employed by the petitioner. Thus, the petitioner has not established that it paid the beneficiary the full proffered wage of \$36,420.80 per year since the priority date of April 30, 2001.

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 figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other

expenses. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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. See *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. 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).

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).

The petitioner's Form 1120 tax returns list its net income as shown in the table below.

- In 2001, the Form 1120 stated net income³ of \$23,031.00. However, the petitioner provided two separate Forms 1120 X, Amended U.S. Corporation Income Tax Return, which listed the petitioner's net income for 2001 as \$23,031.00 and \$0.00, respectively.
- In 2002, the Form 1120 stated net income of \$10,343.00. However, the petitioner provided a Form 1120 X amended return that listed the petitioner's net income for 2002 as <\$49,889.00>.⁴
- In 2003, the Form 1120 stated net income of <\$413,157.00>.
- In 2004, the Form 1120 stated net income of \$3,604.00.
- In 2005, the Form 1120 stated net income of <\$84,194.00>.
- In 2006, the Form 1120 stated net income of <\$133,943.00>.
- In 2007, the Form 1120 stated net income of <\$183,596.00>.
- In 2008, the Form 1120 stated net income of <\$113,489.00>.
- In 2009, the Form 1120 stated net income of \$104,436.00.

It is noted that the petitioner's Form 1120 tax returns and the Form 1120X amended returns were not certified as being filed with the Internal Revenue Service (IRS). The AAO finds that, based upon the original and amended tax returns for 2001 and 2002 and the original Form 1120 tax returns for the years from 2003 to 2009, the petitioner had sufficient net income to pay the full proffered wage of \$36,420.80 in 2009, but did not have sufficient net income to pay the proffered wage from 2001 to 2008.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some

³ 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.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111. Therefore, the AAO will not consider the petitioner's depreciation when evaluating its continuing ability to pay the proffered wage to the beneficiary.

Counsel asserts that the AAO should consider the petitioner's net operating loss (NOL) deduction when analyzing its ability to pay. The NOL deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses.

If a corporation carries forward its NOL, it enters the carryover on Schedule K, Form 1120, line 12. It also enters the deduction for the carryover on line 29(a) of Form 1120 or line 25(a) of Form 1120-A. However, the carryover cannot be more than the corporation's taxable income after special deductions. *See* 26 C.F.R. §1.172-4 and 26 C.F.R. §1.172-5. *See also* Corporations, I.R.S. Pub. No. 542, at 15-16 (March 2012), <http://www.irs.gov/pub/irs-pdf/p542.pdf> (accessed July 17, 2012). Because a petitioner's NOL is related to another year's outcome, it should be omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. USCIS disregards NOL in C corporations by using Line 28 (taxable income before NOL deduction and special deductions) of the Form 1120 in the computation of net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A

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

corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the Form 1120 tax return and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. 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.

- In 2001, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as \$97,461.00. Although the petitioner provided two separate Form 1120X amended returns for 2001, neither amended return listed different net current assets for the petitioner.
- In 2002, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as <\$40,774.00>. However, the petitioner provided a Form 1120X amended return that listed the petitioner's net current assets for 2002 as <\$78,267.00>.
- In 2003, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as \$751,996.00.
- In 2004, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as \$103,306.00.
- In 2005, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as <\$306,800.00>.
- In 2006, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as <\$552,714.00>.
- In 2007, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as <\$482,184.00>.
- In 2008, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as <\$624,030.00>.
- In 2009, Schedule L of the Form 1120 tax return listed the petitioner's net current assets as <\$494,785.00>.

It is noted once again that the petitioner's Form 1120 tax returns and the Form 1120X amended returns were not certified as being filed with the IRS. The AAO finds that, based upon the original and amended tax returns for 2001 and 2002 and the original Form 1120 tax returns for years from 2003 to 2009, the petitioner had sufficient net current assets to pay the full proffered wage of \$36,420.80 in 2001, 2003 and 2004, but did not have sufficient net current assets to pay the proffered wage in 2002, 2005, 2006, 2007, 2008, and 2009.

The record contains an affidavit that is dated March 14, 2011, and signed by [REDACTED] [REDACTED] stated that he is the sole owner of the petitioner, [REDACTED] with [REDACTED], and holds a fifty percent ownership interest in [REDACTED] with [REDACTED] [REDACTED] stated that he is willing to utilize the resources of his related entities, including officer compensation, to pay the proffered wage to the beneficiary.

and salaries). *Id.* at 118.

The record contains another affidavit that is dated March 14, 2011, and signed by [REDACTED]. [REDACTED] stated that he is an officer of the petitioner, [REDACTED], with [REDACTED] and holds a thirty-three percent ownership interest in [REDACTED], with [REDACTED] a fifty percent ownership interest in [REDACTED] and a fifty percent ownership interest in [REDACTED] with [REDACTED]. [REDACTED] stated that he is willing to utilize the resources of his related entities, including officer compensation, to pay the proffered wage to the beneficiary.

Counsel contends that the assets of the petitioner, [REDACTED] Supermarket, Inc., as well as the assets of the related business entities, [REDACTED] and [REDACTED], should be considered in determining the petitioner's continuing ability to pay the proffered wage. Counsel submitted the Form 1065 tax returns for the partnership, [REDACTED], with [REDACTED], for the years from 2000 through 2009, the Form 1065 tax returns for the partnership, [REDACTED], for the years from 2000 through 2009, and the Form 1065 tax returns for the partnership, [REDACTED] with [REDACTED], for 2002, 2006, and 2007, in an attempt to demonstrate the petitioner's [REDACTED] with [REDACTED] continuing ability to pay the proffered wage since the priority date. However, the tax returns of the partnership, [REDACTED], the partnership, [REDACTED] and the partnership, [REDACTED], cannot be considered as relevant and credible evidence of the petitioner's ability to pay the proffered wage as the petitioner is listed on both the Form ETA 750 and the Form I-140 petition as [REDACTED].

The evidence in the record of proceeding and the publically accessible website at <http://www.concord-sots.ct.gov> confirms that the petitioner, [REDACTED], with [REDACTED] is a separate and distinct C corporation from the business entities [REDACTED] and [REDACTED].

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." Thus, the evidence in the record does not establish that the petitioner, [REDACTED] and the business entities [REDACTED] and [REDACTED] are one and the same corporation for the purpose of establishing the petitioner's continuing ability to pay the proffered wage since the priority date in the instant case.

Accordingly, from the priority date of April 30, 2001, the petitioner has not established the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

Counsel is correct in asserting that 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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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.

A review of the Schedule K of petitioner's [REDACTED] Form 1120 tax returns for the years 2001, 2002, 2003 and 2004 reveals that the preparer listed the petitioner's business activity code [REDACTED] on line 2a, its business activity as "Retail" on line 2b, and its product or service as "Food" on line 2c. The publically accessible website at [REDACTED] provides a listing of Internal Revenue Service (IRS) business codes and indicates that the code [REDACTED] is the description for "Supermarkets and Other Grocery Stores." However, a review of the Schedule K of petitioner's ([REDACTED]) Form 1120 tax returns for the years 2005, 2006, 2007, 2008, and 2009 reveals that preparer listed the petitioner's business activity code as [REDACTED] on line 2a, its business activity as "Business support" on line 2b, and its product or service as "Management" on line 2c. The website at [REDACTED] indicates that the code [REDACTED] is the description for "Other Business Support Services." While the nature of the business conducted by the petitioner, [REDACTED], underwent a significant change beginning in 2005, it is clear that the petitioner has remained the same active business entity since the priority date of April 30, 2001 up through the present. Nevertheless, the petitioner failed to reflect the change in the nature of its business from a supermarket to a management company either on Form ETA 750 that was amended by the petitioner on March 8, 2007 or at part 5, section 2 of the Form I-140 petition that was filed on August 3, 2007. Although the continued characterization of the petitioner as a

supermarket after 2005 was at best a misrepresentation through negligence or at worst a willful misrepresentation of the facts, this issue is not material in the instant proceedings as the petitioner, [REDACTED], remains an active business entity that continues to intend to hire the beneficiary in the proffered position of bookkeeper.

A review of the Schedule E of petitioner's [REDACTED] Form 1120 tax returns for the years 2001 and 2002 reveals that the preparer listed [REDACTED] and [REDACTED] as the petitioner's owners and officers with combined compensation of \$450,000.00 in 2001 and \$285,000.00 in 2002. The Schedule E of petitioner's [REDACTED] Form 1120 tax returns for the years 2003 and 2004 reveals that the preparer listed [REDACTED] as the petitioner's sole owner and officer with compensation of \$250,000.00 in 2003 and \$100,000.00 in 2004. The Schedule E of petitioner's [REDACTED] Form 1120 tax returns for the years 2005, 2006, 2007, 2008 and 2009, do not list any owners or officers, but line 12 of the Form 1120 tax returns lists officer compensation of \$100,000.00 in 2005, \$25,000.00 in 2006, \$25,000.00 in 2007, \$25,000.00 in 2008, and \$20,000.00 in 2009. Although the record contains an affidavit signed by [REDACTED] in which he indicated that he was willing to forego his officer compensation as the sole owner of the petitioner, [REDACTED], with [REDACTED] the petitioner's Form 1120 tax returns for 2006, 2007, 2008, and 2009, reflect that officer compensation paid by the petitioner in those years was well below the proffered wage of \$36,420.80.

In the instant case, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. Further, no credible evidence has been presented to show that the petitioner's owner is willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has had the continuing ability to pay the proffered wage from the priority date of April 30, 2001, up to the present. The burden of proof in these proceedings rests solely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.