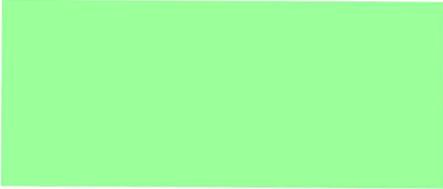




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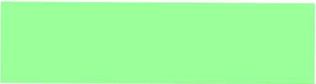


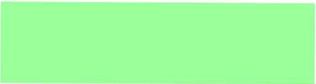
DATE: **APR 24 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

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

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,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion to reopen. The director dismissed the motion and affirmed his original decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate company. It seeks to employ the beneficiary permanently in the United States as a real estate sales agent. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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, 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 June 7, 2011 denial, the 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. Subsequent to the denial, the petitioner filed a motion to reopen and a motion to reconsider the decision on July 8, 2011. The director dismissed the motion to reopen on December 7, 2011 and the petitioner's appeal followed. On February 21, 2013, the AAO issued a request for evidence on the issues of the petitioner's ability to pay the proffered wage, the beneficiary's experience, and whether the petitioner will be the beneficiary's actual employer. The AAO received the petitioner's response to the request for evidence on April 1, 2013. The response included: a letter from the president of the petitioning company; 2008, 2009, 2010, and 2011 tax returns; an experience letter from the beneficiary's previous employer; and newspaper articles.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 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 two 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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on February 4, 2008. The proffered wage as stated on the ETA Form 9089 is \$29.22 per hour with a 35 hour work week (\$53,180 per year). The ETA Form 9089 states that the position requires two years of experience in the job offered of real estate sales agent as well as the special skills of “[f]luency in Japanese/English language/business culture required. New York State Real Estate License or qualifications for same is required by law.”

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 2 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 19, 2010, the beneficiary 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 an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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

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).

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 has not established that it paid the beneficiary the full proffered wage, or submitted evidence of any wages paid, during any relevant timeframe including the period from the priority date in 2008 or subsequently.

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 (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. *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 record before the AAO closed on April 1, 2013 with the receipt by the AAO of the petitioner’s submissions in response to the AAO’s request for evidence. As of that date, the petitioner’s 2012 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2011 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2008 through 2011 as shown in the table below.

- In 2008, the Form 1120S stated net income² of \$343,340.
- In 2009, the Form 1120S stated net income of \$1,169.
- In 2010, the Form 1120S stated net income of \$16,835.
- In 2011, the Form 1120S stated net income of \$13,181.

Therefore, for 2009, 2010, and 2011, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner had sufficient net income to pay the proffered wage in 2008.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. 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. The petitioner’s tax returns demonstrate its end-of-year net current assets for 2008 through 2011, as shown in the table below.

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 17, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2008, 2009, 2010, and 2011 the petitioner’s net income is found on Schedule K of its 2008, 2009, 2010, and 2011 tax returns.

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

- In 2008, the Form 1120S stated net current assets of \$49,312.
- In 2009, the Form 1120S stated net current assets of \$32,196.
- In 2010, the Form 1120S stated net current assets of \$30,633.
- In 2011, the Form 1120S stated net current assets of -\$7,597.

As noted above, the petitioner had sufficient net income to pay the proffered wage in 2008. However, for the years 2009, 2010, and 2011 the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, the petitioner cannot establish its ability to pay in 2009, 2010, and 2011 based on its net current assets.

Thus, from the date the ETA Form 9089 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, here none, or its net income or net current assets.

Counsel asserts on appeal that USCIS: (1) acted in bad faith by failing to send the Notice of Denial to counsel; (2) erred by failing to treat the petitioner's escrow account as a bank account within the meaning of the regulations at 8 C.F.R. § 204.5(g)(2); (3) incorrectly excluded from the ability to pay calculation the escrow account funds set aside for the beneficiary's salary; (4) improperly ascribed greater weight to the Yates Memorandum than the totality of the circumstances language in the regulations; and (5) erred by failing to excuse the petitioner's inability to pay the proffered wage based on the totality of the circumstances reasoning in *Sonegawa*. Specifically, counsel states that that the economic downturn negatively affected the housing industry and related commercial endeavors to include the petitioner's business.

First, the record of proceeding shows that counsel was listed on the decision and it appears that USCIS mailed a copy of the denial in this matter to counsel on June 7, 2011. The record also reflects that subsequent to the director's June 7, 2011 denial, the petitioner's counsel timely filed a motion to reopen on July 8, 2011 and a timely appeal following the director's decision on the motion to reopen. Thus, the petitioner suffered no injury as counsel timely filed both the motion to reopen and the subsequent appeal from the denial. Furthermore, it is not clear what remedy would be appropriate beyond the appeal process itself.

Counsel's arguments on the escrow account will be discussed together. Counsel mischaracterizes the director's denial in his appeal brief by extracting a portion of a sentence from the decision. In his brief, counsel states, "[w]e note that the examiner erred in concluding that an escrow account entry allotted for \$53,000 was 'not among the three types of evidence enumerated in Title 8, Code of Federal Regulations, Section 204.5(g)(2).'" In fact, the complete sentence states, "[b]ank statements are not among the three types of evidence, enumerated in Title 8, Code of Federal Regulations, Section 204.5(g)(2), *required* to illustrate a petitioner's ability to pay a proffered wage (emphasis added)." The regulation at 8 C.F.R. § 204.5(g)(2) also states, "[i]n appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service."

Further, counsel is incorrect that the director's denial did not treat the petitioner's escrow account as a bank account within the meaning of the regulations at 8 C.F.R. § 204.5(g)(2). In fact, in the decision, the director does treat the escrow account as a bank account, stating, "[t]he petitioner submitted partial copies of [REDACTED] statement for period January 1 – January 31, 2011 showing a notation next to \$53,500 noting 'for intended employee [the beneficiary].'" The director further states, "[t]he bank statements present a portrayal of the petitioner's assets" and concludes that there is no evidence to show that this \$53,500 was not already included in the petitioner's assets reflected on the petitioner's 2009 federal tax return which were considered as part of the petitioner's net current assets in the director's decision and again above.

Counsel's reliance on the balance in the petitioner's escrow account or bank statements generally is misplaced. 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, 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(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner's net current assets.

On appeal, counsel submitted petitioner's [REDACTED] bank statement for an account showing a \$15,000 line of credit. 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 petitioner'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 John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 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'r 1971). Here, the credit line is dated, indicating an "opening date" of May 16, 2011, which is after the February 4, 2008 priority date. 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 petitioner's net current 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 petitioner'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'l Comm'r 1977).

On appeal, counsel asserts that the director improperly relied on the Yates Memorandum. The record of proceeding does not support this contention. The director's decision analyzed the evidence the petitioner submitted pursuant to 8 C.F.R. § 204.5(g)(2) and concluded that the evidence submitted in the form of the 2008 and 2009 corporate tax returns do not demonstrate that the petitioner had the continuing ability to pay the proffered wage.

Counsel asserts that the petitioner can demonstrate its ability to pay the proffered wage in 2009 based on the totality of the circumstances reasoning in *Sonegawa*. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Specifically, counsel states that that the economic downturn negatively affected the housing industry and related commercial endeavors to include the petitioner's business. To support this argument, counsel points to the petitioner's 2009 tax return and additional evidence submitted including two newspaper articles that discuss the real estate market in 2009 and a letter from [REDACTED] stating that he believes that the petitioner should have had the financial ability to pay the proffered wage for both 2008 and 2009. For 2009, he relies on factors including the petitioner's 2008 distribution of \$215,818 to the 100% shareholder of the petitioner. [REDACTED] letter, dated January 5, 2012, states, "[b]ased on my review, since the Company had a profit of \$343,340 in 2008, it should have been able to pay the said worker had he [sic] been hired in 2008."⁴

In addition to examination of the federal tax returns, 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

⁴ Records show that the New York Department of State, Division of Licensing Services, issued a real estate salesperson license effective from May 10, 2007 to May 10, 2009, to the beneficiary with the petitioner listed as the affiliated company. But, there is no evidence that the petitioner paid wages to the beneficiary.

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 indicates that it has been in business since 1996. The petitioner's tax returns show that its gross receipts decreased each year from 2008 to 2010. Additionally, gross receipts in 2010 and 2011 are less than half of the 2008 gross receipts. Officer compensation in 2010 and 2011 was very low. The 2010 1120S reflects officer compensation of \$8,019. The 2011 1120S reflects officer compensation of \$5,500. The petitioner reported no officer compensation in 2008 or 2009. Although the petitioner has been in business since 1996, there is no evidence in the record of the historical growth of the petitioner's business.

Despite the fact that the petitioner's net income exceeded the proffered wage in 2008, net income in 2009 does not appear to represent a short-term decline because net income was also low in 2010. Net income dropped from 2010 to 2011. The record also does not contain evidence of the petitioner's reputation within its industry. Counsel's argument that the petitioner could have applied his 2008 distribution to the beneficiary's salary in year 2009 is unpersuasive. USCIS (legacy INS) has long held that it 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'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 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.

The petitioner's 2010 and 2011 tax returns submitted in response to the AAO's request for evidence do not demonstrate the company's historical growth, a recovery in its gross receipts after 2009, specific evidence to explain its 2009 losses, or evidence of reputation. In response to the AAO's request for evidence, the petitioner submitted an article that details plans by a Japanese billionaire to buy properties in Tokyo, New York and London as support for his assertion that the coming increase in New York real estate by overseas investors along with favorable exchange rates, will result in the dramatic expansion of the petitioner's business. The article does not constitute evidence to support the petitioner's assertion of a "dramatic expansion." The article is a general one on real estate and does not mention the petition's business. Second, the article is speculative and does not provide evidence of the petitioner's ability to pay the proffered wage.

Additionally, counsel's claims regarding unusual expenses in 2009 due to higher than normal advertising costs, creation of the company's website and expenses for travel meals, entertainment and dues are unpersuasive as advertising, website creation and the expenses listed are normal, characteristic business expenditures of a real estate company and not similar to the uncharacteristic

expenditures of *Sonegawa*.⁵ Even if 2009 expenses were considered uncharacteristic as in *Sonegawa*, the petitioner has not established the ability to pay the proffered wage in 2010 and 2011.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

ORDER: The appeal is dismissed.

⁵ In his "Brief in Support of Response to Notice of Intent to Deny," counsel states that "the total spent in 2008 and 2009 for repairs were respectively \$4,219 and \$7,284 (Line 10 Forms 8825, Exhibits A and B), this is \$861 and \$3,926 above the average." Even adding these amounts back, the petitioner would not be able to establish its ability to pay in 2009.