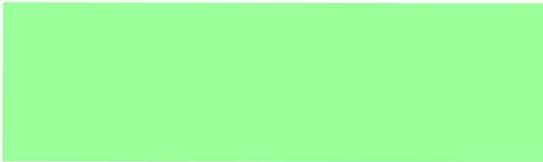


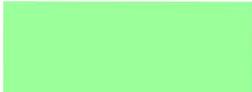
(b)(6)

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



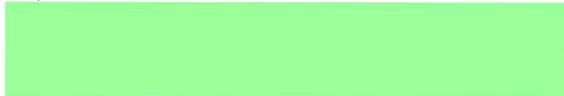
U.S. Citizenship
and Immigration
Services



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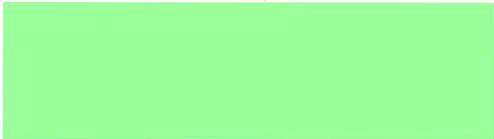
FEB 01 2013

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner owns and operates a motel in Montgomery, Alabama.¹ It seeks to employ the beneficiary permanently in the United States as a manager. 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).² 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 August 11, 2010 denial, the single issue in this case is whether or not the petitioner has had 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 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.

¹ The petitioner identifies itself as [REDACTED] in the petition. According to the Alabama Secretary of State's office, the petitioner's legal name is [REDACTED], as listed on its federal income tax returns. Copies of financial documents and a letter from the petitioner's accountant that the petitioner submitted to U.S. Citizenship and Immigration Services (USCIS) state that the petitioner does business as Travel Inn Motel.

² The approved labor certification states the title of the offered position as "Night Auditor/Manager." The petitioner identifies the offered position in its petition as "Manager, Hotel." Despite the inconsistent titles, there do not appear to be any material differences in the descriptions of the offered position in the labor certification and petition.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date any office within the employment system of the DOL accepted the Form ETA 750, Application for Alien Employment Certification, for processing. *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, Application for Alien 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 Form ETA 750 was accepted on April 30, 2001. The proffered wage, as stated on the Form ETA 750, is \$45,000 per year for a 40-hour work week. The Form ETA 750 states that the position requires two years of full-time 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.³

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 1993⁴ and to employ three workers. According to the tax returns that the petitioner submitted, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, which the beneficiary signed on April 19, 2001, 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 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'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. USCIS will also consider the totality of the circumstances affecting the petitioning business. *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

³ 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).

⁴ According to the Alabama Secretary of State's office, the petitioner was incorporated on February 22, 1994.

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 does not claim that it employed and paid the beneficiary during the relevant time period. But the AAO notes that a payroll expense attachment to the petitioner's 2008 Alabama state income tax return, which the petitioner submitted to the director with its 2008 federal income tax return, shows that, from August 1, 2008 through December 3, 2008, the petitioner made six payments to the beneficiary of \$2,729.06, totaling \$16,374.36. The petitioner has not established that it employed and paid the beneficiary the full proffered wage rate since the priority date. The petitioner's 2008 payments of \$16,374.36 to the beneficiary are \$28,625.64 short of the annual offered wage of \$45,000. If the petitioner can show 2008 net income or net current asset amounts of at least \$28,625.64, however, the petitioner can combine the net income or net current asset amount with the amount it paid the beneficiary and thereby demonstrate its ability to pay the offered wage in 2008.

Where 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 next examines the net income figures reflected on the petitioner's federal income tax returns, 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 expenses are 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 also 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 director closed on May 24, 2010 with her receipt of the petitioner’s submissions in response to her request for evidence. The petitioner’s income tax return for 2008 was the most recent return submitted.⁵

The petitioner’s tax returns demonstrate net income amounts on Form 1120S⁶ as follows: \$23,903 for 2001; \$2,569 for 2002; \$5,169 for 2003; \$20,919 for 2004; \$21,043 for 2005; \$38,717 for 2006; \$31,928 for 2007; and \$28,330 for 2008. None of the petitioner’s net income amounts for these years equal or exceed the offered annual wage of \$45,000. Therefore, the petitioner’s tax returns show that, for the years 2001 through 2008, the petitioner did not have sufficient net income to pay the proffered wage. Also, combining the \$16,374.36 that the petitioner paid the beneficiary in 2008 with its 2008 net income amount of \$28,330 yields \$44,704.36, about \$300 less than the \$45,000 annual offered wage.

⁵ There is no explanation in the record as to why the petitioner did not submit a copy of its 2009 federal income tax return.

⁶ 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 26, 2012) (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 2005, the petitioner’s net income is found on Schedule K, line 17e, of its 2005 tax return.

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.⁷ 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 asset amounts as follows: in 2001, \$17,555 in current assets with \$5,000 in current liabilities for a net current asset amount of \$12,555; in 2002, \$14,869 in current assets with no current liabilities for a net current asset amount of \$14,869; in 2003, \$9,039 in current assets with no current liabilities for a net current asset amount of \$9,039; in 2004, \$10,875 in current assets with no current liabilities for a net current asset amount of \$10,875; in 2005, \$15,852 in current assets with no current liabilities for a net current asset amount of \$15,852; in 2006, \$22,850 in current assets with no current liabilities for a net current asset amount of \$22,850; in 2007, \$14,225 in current assets with \$5,488 in current liabilities for a net current asset amount of \$8,737; and, in 2008, \$18,776 in current assets minus with no current liabilities for a net current asset amount of \$18,776.

The petitioner's tax returns show that its year-end net current asset amounts from 2001 through 2008 do not equal or exceed the annual offered wage of \$45,000. Therefore, for the years 2001 through 2008, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. Also, combining the \$16,374.36 that the petitioner paid the beneficiary in 2008 with its 2008 net current asset amount of \$18,776 yields \$35,150.36, about \$10,000 below the annual offered wage of \$45,000.

Since the date the DOL accepted Form ETA 750 for processing, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage based on an examination of wages it paid to the beneficiary, its net income amounts, and its net current asset amounts.

On appeal, counsel asserts that the director improperly disregarded the "expert testimony" of the petitioner's accountant and relevant evidence showing that the petitioner has had the ability to pay the offered wage rate. The AAO will consider the accountant's testimony and other evidence as it relates to each issue raised in the accountant's letter.

First, in his May 20, 2010 letter, the petitioner's accountant states that the petitioner fully paid off a long-term loan against its real property on February 15, 2002. According to the accountant, the petitioner mistakenly continued to list the loan as a long-term liability on Schedule L of its federal

⁷According 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 and salaries). *Id.* at 118.

income tax returns after it paid off the loan. The accountant said more than \$400,000 of equity is therefore available to the petitioner in relevant years to pay the beneficiary's offered wage because of the petitioner's failure to eliminate the long-term liability amount from its annual tax returns.

A review of the petitioner's federal tax returns shows that Schedules L, lines 20, indicate year-end "[m]ortgages, notes, bonds payable in 1 year or more" from 2001 through 2008 ranging in amounts from zero in 2002 to \$431,888 in 2005. The AAO, however, will not accept the assertion of the petitioner's accountant that the petitioner mistakenly entered the long-term liability amounts on its tax returns without corroborative evidence, such as evidence of the loan, its amount, and its interest rate; evidence that the petitioner paid off the loan; and certified, amended tax returns. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972) (Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

Moreover, even if the petitioner established that it mistakenly listed the long-term loan as a liability on its annual tax returns, the elimination of that long-term liability does not demonstrate the petitioner's ability to pay the offered wage each year. The elimination of the long-term liability would increase shareholders' equity in the company each year by reducing total liabilities. But the petitioner has not demonstrated that an increase in shareholders' equity would result in additional current assets available to pay the beneficiary's offered wage each year. *See Sitar Restaurant v. Ashcroft*, 2003WL22203713, *4 (D.Mass. Sept. 18, 2003) (unclear that "shareholders' equity" enhances the petitioner's ability to pay the offered wage).

The accountant also states that the petitioner's motel is worth more than \$1 million, and the petitioner has no debt. As the director indicated in his decision, however, the petitioner's real property is a long-term asset, not a current asset that would be immediately available to pay the beneficiary's offered wage. Further, the AAO finds that the petitioner is unlikely to sell or encumber its motel to pay the beneficiary's offered wage because, without the motel, the petitioner would not need the beneficiary's management services. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, the accountant states that the petitioner could combine a variety of financial resources – including its net income, cash, net current assets, depreciation expenses, paid-in capital and retained earnings – to demonstrate its ability to pay the offered wage during the relevant years. The AAO, however, has already reviewed the petitioner's net income and net current asset amounts, which include cash, and found them insufficient to pay the beneficiary's offered wage.

Moreover, the AAO finds the addition of the petitioner's cash, as listed on Schedules L of its federal tax returns, to its net profits to determine the funds available to pay the proffered wage inappropriate. The petitioner spends a portion of its revenue during a given year on expenses, and the balance represents the petitioner's net income. Of its net income, the petitioner retains a portion as cash. Therefore, adding the petitioner's Schedule L cash to its net income would likely, at least in part, be

duplicative. The petitioner's net current assets include its Schedule L cash. The AAO therefore separately considers net current assets from the petitioner's net income.

Similarly, in determining the petitioner's ability to pay, the AAO finds it inappropriate to combine the petitioner's net income with its net current assets. The AAO does not view net income and net current assets as cumulative. Rather, the AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective in nature and one prospective. Net income is retrospective because it represents the sum of income remaining after the petitioner paid all expenses over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given the natures of net income as retrospective and net current assets as prospective, the AAO disagrees with the assertion of petitioner's accountant that the petitioner can combine the two figures in a meaningful way to illustrate its ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current asset amounts could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

The petitioner's accountant also suggests consideration of depreciation expenses in assessing the petitioner's ability to pay the offered wage. As the director stated in her decision and as indicated above, USCIS will not add back depreciation expenses to a petitioner's net income to demonstrate its ability to pay the offered wage. USCIS recognizes that depreciation expenses represent non-cash amounts that reduce a petitioner's income for accounting and tax purposes. But depreciation expenses also reflect the actual cost of doing business, either the diminution in value of aging buildings and equipment, or the accumulation of funds necessary to replace perishable equipment and buildings. Thus, while depreciation expenses do not represent a petitioner's current use of cash, neither do they represent amounts available to pay wages. *See River Street Donuts* at 118; *Chi-Feng Chang* at 537.

In determining the petitioner's ability to pay the offered wage, the AAO also rejects the suggestion of the petitioner's accountant to consider the petitioner's retained earnings. Retained earnings represent earnings that a company has accumulated since its inception, less dividends. Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). Because retained earnings are cumulative, adding them to net income and/or net current assets would be duplicative. Therefore, USCIS considers each particular year's net income, rather than the cumulative total of the previous years' net incomes, less dividends.

Further, even if considered separately from net income and net current assets, retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of federal income tax returns and generally represent the non-cash value of a company's assets. Thus, retained earnings do not generally represent current assets that a company can liquidate during the course of normal business. Nor has the petitioner provided evidence to show that it can immediately liquidate its retained earnings amounts.

The AAO also rejects the suggestion of the accountant to consider the petitioner's paid-in capital when determining the petitioner's ability to pay. Paid-in capital includes the "excess received from stockholders over par value or stated value of the stock issued." *Barron's Dictionary of Accounting Terms* 418 (3rd ed. 2000). Paid-in capital represents, not a current asset, but shareholders' equity. As such, paid-in capital, like retained earnings, typically represents the non-cash value of a company's assets, not current assets that a company can liquidate during the course of normal business. The petitioner has not submitted evidence showing that it can immediately liquidate its paid-in capital amounts.

Finally, the petitioner's accountant states that "the [petitioner's] owner [REDACTED] is a person of substantial personal assets and he could have easily made additional contributions to make up any shortfall in [the beneficiary's] salary during the entire period in question." According to the petitioner's federal income tax returns, [REDACTED] is the petitioner's majority owner, holding 60 percent of its shares.

Notwithstanding the assets of the petitioner's majority owner, it is well-established that a corporation is a separate and distinct legal entity from its owners and shareholders. Therefore, USCIS cannot consider the assets of a corporation's shareholders, or of other enterprises or corporations, in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar, supra*, 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."

The AAO therefore finds that the assertions of the petitioner's accountant do not outweigh the evidence in the petitioner's tax returns, which demonstrates that the petitioner could not pay the proffered wage from the day the DOL accepted the petitioner's Form ETA 750.

USCIS may consider, however, the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonogawa, supra*. The petitioning entity in *Sonogawa* had been in business for more than 11 years and routinely earned a gross annual income of about \$100,000. During the year in which it filed its petition, the petitioner changed business locations and paid rent on both its old and new locations for five months. The petitioner also incurred large moving expenses and was unable to conduct regular business for a period of time. The Regional Commissioner, however, determined that the petitioner established its prospects for a resumption of successful business operations. The petitioner was a fashion designer whose work *Time* and *Look* magazines had featured. Her clients included Miss Universe, movie actresses, and society matrons. Lists of the best-dressed California women included the petitioner's clients. The petitioner lectured on fashion design at design and fashion shows throughout the United States, as well as at colleges and universities in California.

The Regional Commissioner based his determination in *Sonogawa*, in part, on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may consider evidence relevant to the petitioner's financial ability to pay the offered wage 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 its employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, and whether the beneficiary is replacing a former employee or an outsourced service.

In the instant case, the petitioner, like the petitioner in *Sonegawa*, has conducted business for a lengthy period of time. According to the Alabama Secretary of State's office, the petitioner incorporated for the purpose of operating a motel in 1994. The petitioner's federal income tax returns from 2001 through 2008 show that the petitioner has consistently generated profits and positive annual net current asset amounts. The returns also show that the petitioner enjoyed modest growth in total revenues over that time of about 29 percent. The petitioner paid relatively stable annual wage amounts from 2001 to 2007, according to its tax returns, before seeing its wage costs more than double in 2008. The evidence is insufficient for the AAO to conclude whether the higher 2008 wage amount was an aberration or a trend toward a regularly higher payroll.

Nevertheless, the AAO notes that from 2001 to 2007, the beneficiary's annual offered wage of \$45,000 exceeded the petitioner's annual wages paid, as listed on its federal income tax returns. The beneficiary's high annual salary relative to the annual wages the petitioner has traditionally paid causes the AAO to doubt the petitioner's ability to pay the offered wage. The petitioner has also failed to demonstrate an outstanding reputation in its industry or to identify any uncharacteristic expenses or losses that prevented it from demonstrating an ability to pay the offered wage. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO concludes that the petitioner has not established that it has had the continuing ability to pay the proffered wage.

In summary, 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.