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

(b)(6)

[redacted]

DATE: JAN - 4 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 of the Texas 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 is a Mexican restaurant in New York City. It seeks to employ the beneficiary permanently in the United States as a Cook of Mexican-style food. 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 25, 2010 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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 October 2, 2007. The proffered wage, as stated on the ETA Form 9089, is $12.90 per hour (or $26,832 per year, based on a full-time, 40-hour work week). The ETA Form 9089 states that the position requires 24 months of experience in the offered position.

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. In the petition, the petitioner stated that it was established in 1993 and currently employs eight 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 October 20, 2009, the beneficiary did not claim to have worked for the petitioner.[2] But the petitioner submitted copies of an Internal Revenue Service (IRS) Form 1099 indicating that the petitioner paid the beneficiary for work in 2009.

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. The totality of the circumstances affecting the petitioning business will also be considered. *See Matter of Sonegawa*, 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 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, as indicated above, the petitioner has submitted evidence that it employed the beneficiary during the relevant period. The petitioner submitted a copy of an IRS Form 1099,

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[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).

[2] Part K of the ETA Form 9089 required the listing of "all the jobs the alien has held during the past 3 years," as well as "any other experience that qualifies the alien for the job opportunity."

indicating that it paid the beneficiary $19,800 in 2009. The petitioner also submitted copies of four checks to the beneficiary, each in the amount of $475 and dated in separate weeks of July 2010.

The petitioner has not established that it employed the beneficiary at a salary equal to or greater than the offered wage rate from the October 2, 2007 priority date to the present. The petitioner has not submitted evidence to show that it paid the beneficiary in 2007 or 2008. Although the petitioner has established that it paid the beneficiary in 2009, the $19,800 amount paid to the beneficiary in 2009 is less than the annual offered wage rate of $26,832. Regarding the four $475 checks made payable to the beneficiary and dated in July 2010, the petitioner has not demonstrated that the beneficiary actually cashed or deposited the checks. Even if evidence showed that the beneficiary cashed or deposited the checks, the total $1,900 amount of the checks would be less than the annual offered wage.

The petitioner argues that the four checks from July 2010 are examples of regular weekly pay checks, evidencing that the petitioner paid the beneficiary every week in 2010. But, as indicated above, the petitioner has not shown that the beneficiary actually cashed or deposited the checks. Moreover, the petitioner has not submitted enough samples of checks over a long enough period of time to establish that it paid the beneficiary $475 every week in 2010. In addition, even if the petitioner established that it paid the beneficiary $475 every week in 2010, the resulting annual wage of $24,700 would be less than the offered annual wage of $26,832. The petitioner has therefore not established that it employed the beneficiary at a salary equal to or greater than the offered wage rate. The petitioner, however, may combine the $19,800 amount that it paid to the beneficiary in 2009 with at least $7,032 in net income or net current assets of the same year to show its ability to ability to pay the $26,832 annual offered wage in 2009.

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 petitioner has submitted copies of its federal income tax returns for 2007, 2008 and 2009. The petitioner's Forms 1120S for the relevant years stated net income[3] of $(4,732)[4] in 2007, $(10,213) in 2008, and $(50,432) for 2009. Because the petitioner's tax returns reflect negative net incomes for 2007, 2008 and 2009, the petitioner has not established that it had the ability to pay the offered wage

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[3] 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 November 19, 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 no additional income, credits, deductions or other adjustments shown on its Schedule K for 2007, 2008 and 2009, the petitioner's net income is found on line 21 of page one of its tax returns.

[4] Parentheses around numbers are used to reflect negative amounts.

rate in those years. Nor would combining the negative net income amount for 2009 with the amount that the petitioner paid to the beneficiary in the same year meet or exceed the annual offered wage.

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.[5] 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 show end-of-year net current assets of $(30,830) ($149,151 in current assets minus $179,981 in current liabilities) for 2007, $(35,184) ($148,956 in current assets minus $184,140 in current liabilities) for 2008, and $(53,052) ($211,162 in current assets minus $264,214 in current liabilities) for 2009. Because the petitioner's tax returns show negative net current asset amounts for 2007, 2008 and 2009, the petitioner has not demonstrated sufficient net current assets to pay the proffered wage. Nor would combining the negative net current asset amount for 2009 with the amount the petitioner paid to the beneficiary in the same year meet or exceed the annual offered wage.

Therefore, from the date the DOL accepted the ETA Form 9089 for processing, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage, or the difference between the wages paid and its net income or net current assets.

Counsel asserts on appeal that the offered wage of $12.90 an hour equates to an annual wage of $23,478, not an annual wage of $26,832 as USCIS has determined. Counsel appears to base his annual offered wage figure of $23,478 on a 35-hour work week (35 x $12.90 x 52 = $23,478). Indeed, the DOL considers a 35-hour week to constitute "full-time" employment. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). For labor certification purposes, all job offers must be for "full-time" employment. *See* 20 C.F.R. §§ 656.3, 656.10(c)(10).

But evidence in the record does not support counsel's argument that the petitioner intended to offer the beneficiary an annual wage of $23,478. The petitioner does not specify the weekly work hours it has offered to the beneficiary in either the labor certification or the immigrant visa petition. In Part 6 of Form I-140, Immigrant Petition for Alien Worker, however, the petitioner lists the offered weekly wage to the beneficiary as "$516.00," a figure that appears to be based on a 40-hour work week (40 x 12.90 = $516) and that would yield an annual offered wage of $26,832. ($516 x 52). Without

[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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corroborating evidence, USCIS cannot accept counsel's assertion that, despite indicating a weekly wage rate of $516 in its petition, the petitioner instead intended to offer the beneficiary an annual wage of only $23,478. *See, e.g., Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988)(the unsupported assertion of an attorney does not constitute evidence). Based on the petitioner's indication on its signed Form I-140 petition of a $516 weekly wage, USCIS finds that the preponderance of the evidence indicates that the petitioner offered the beneficiary a full-time job resulting in an annual offered wage rate of $26,832 (or $516 a week for 52 weeks). Moreover, even if the petitioner established that the offered annual wage was only $23,862, the petitioner still has not demonstrated that it has had the continuing financial ability to pay the lesser annual wage amount since the priority date.

Counsel also argues that the director failed to consider the written offer of one of the petitioner's officers and shareholders to forego his compensation to enable the petitioner to pay the beneficiary's offered wage. In a sworn affidavit dated April 12, 2010 that petitioner submitted to USCIS, Mr. petitioner's president, stated that he was "completely willing to reduce [his] compensation to pay the beneficiary the prevailing wage in the amount of $12.90 per hour." USCIS agrees that it should have considered the officer's offer to forego compensation. But USCIS's error was harmless, as the officer's pledge is insufficient to demonstrate the petitioner's ability to pay the offered wage rate since the priority date. *See Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 401 (2d Cir.2005)(holding that remand to immigration agency was not required where there was "no realistic possibility" that, absent the errors, the agency would have reached a different conclusion).

USCIS agrees that shareholders of closely held corporations, like petitioner, have the authority to allocate corporate expenses for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, a petitioner's figures for compensation of officers may be considered in appropriate circumstances as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that Mr. holds 50 percent of the petitioner's stock, with another officer and shareholder owning the remaining 50 percent. According to the petitioner's tax returns, the petitioner paid total officer compensation of $62,500 in both 2007 and 2008, and total officer compensation of $47,000 in 2009. USCIS notes that the compensation that the petitioner's officers received during these three years was not a fixed salary.

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'r 1980). In a similar case, 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." In the present case, however, the petitioner is not suggesting that USCIS examine the personal assets of the petitioner's officers and shareholders, but, rather, the

financial flexibility that the employee-owners have in setting their salaries based on the profitability of their business.

Counsel argues that the shareholder has reasonably listed his "Family's Yearly Expenses" – including mortgage, food, insurance, and utility expenses - as $32,274 for 2007, $30,600 for 2008, and $32,840 for 2009. Reducing the total amounts that the petitioner paid in officer compensation, as listed on its tax returns, by the yearly expenses of the officer and his family would result in available, foregone compensation of $30,226 in 2007 ($62,500 minus $32,274), $31,900 in 2008 ($62,500 minus $30,600), and $14,160 ($47,000 minus $32,840) in 2009, according to counsel. The officer's foregoing of his compensation in 2007 and 2008 would cover the beneficiary's offered annual wage rate in those years, counsel asserts. And the officer's foregoing of $14,160 in compensation in 2009, combined with the $19,800 that the petitioner established that it paid to the beneficiary that year, would cover the beneficiary's annual salary for 2009, counsel argues.

Mr. however, is but one of the petitioner's officers and shareholders. Another shareholder owns the remaining half of the company, according to the petitioner's federal tax returns. The petitioner has not provided evidence that the other shareholder has agreed to forego his or her officer compensation. If the other shareholder does not pledge to forego his or her compensation, then only Mr. compensation can be considered available to pay the offered wage. According to the petitioner's tax returns, Mr. received $31,500 of the total $62,500 in officer compensation in 2007, $31,250 of the total $62,500 in officer compensation in 2008, and $23,500 of the total $47,000 in officer compensation in 2009. Reducing only Mr. annual officer compensation amounts by the annual living expenses he submitted would result in insufficient funds to pay the beneficiary's offered wage in 2007 ($31,500 in compensation minus $32,274 in expenses), 2008 ($31,250 minus $30,600), and 2009 ($23,500 minus $32,840).

Moreover, in his affidavit of April 12, 2010, Mr. expressed a willingness to forego his compensation in the future. He stated that he was "willing to reduce [his] compensation...," not that he was returning all compensation he had received since 2007. An officer's pledge to forego future compensation is not sufficient to establish the ability to pay the beneficiary's offered wage rate in the past. *See* 8 C.F.R. Sect. 204.5(g)(2) (requiring petitioner to demonstrate "continuing" ability to pay from "the time the priority date is established."); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971)(A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a later time). Even if Mr. began foregoing his compensation immediately after executing his affidavit in April 2010, his foregone compensation would not retroactively make funds available for 2007, 2008 and 2009. The petitioner has therefore not established that it has had the continuing ability to pay the offered wage rate based on the officer's offer to forego his compensation.

The petitioner also argues on appeal that, in determining the petitioner's ability to pay the offered wage, the director failed to consider the petitioner's 2009 monthly bank account statements, which the petitioner submitted to USCIS before its 2009 federal tax return became available. The petitioner's monthly bank statements are from January 2009 to August 2009, and show an average monthly balance of $11,899.52 for the eight-month period. The petitioner argues that its average

monthly bank account balance far exceeded the monthly salary of $2,236 that would be due to the beneficiary.

The bank statements, however, are insufficient evidence of the petitioner's ability to pay the offered wage rate. The petitioner did not submit evidence to demonstrate that the funds reported on its bank statements reflect additional cash that was available to pay wages. Companies are generally required to reflect available cash in their bank accounts on their federal income tax returns, either in the taxable income amount (income minus deductions) or in the cash specified on Schedule L, Line 1 under "current assets." As discussed above, USCIS has already considered the petitioner's 2009 net income and net current assets, as listed on its 2009 federal tax returns, in determining that the petitioner has not demonstrated a continuing ability to pay the offered wage. Without evidence to the contrary, USCIS will not consider the amounts in the petitioner's bank accounts as additional funds that were available to pay wages in 2009.

Finally, the petitioner argues that the director should have considered the totality of the circumstances in determining whether the petitioner has the continuing ability to pay the offered wage rate. The petitioner's argument is well-taken. As indicated above, 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 Sonegawa, supra.*

In *Sonegawa*, the petitioning entity had been in business for over 11 years. During the year in which the petition was filed, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were substantial moving costs and also a period of time when the petitioner was unable to conduct 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. As in *Sonegawa*, USCIS may 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 relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner argues that its ability to provide high-quality Mexican food in [redacted] since 1993, even during the loss of business that resulted from the September 11, 2001 attacks on the nearby World Trade Center, demonstrates its continued ability to pay the beneficiary's offered wage rate. While the petitioner has been in business for an impressive amount

of time and its business may have suffered in the wake of the World Trade Center attacks, USCIS finds the petitioner's circumstances do not warrant a favorable determination under *Sonegawa*.

Unlike the petitioner in *Sonegawa*, who had only one sub-par financial year out of 11 years, the petitioner's federal income tax returns indicate a string of recent poor financial years. The petitioner's tax returns show that its gross sales declined from 2007 to 2009, while its losses have increased over the same period of time. Also, unlike the petitioner in *Sonegawa*, the petitioner has not demonstrated an outstanding reputation in its industry that persuades USCIS that its business will financially recover.

Nor has the petitioner linked its recent financial difficulties to any temporary, uncharacteristic business costs or losses. Counsel mentions the loss of business that the 2001 World Trade Center attacks caused. The record of proceeding, however, contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001.

USCIS also notes that petitioner submitted copies of its 2001 and 2002 federal income tax returns in connection with a previous immigrant visa petition for the same position and beneficiary. *See* EAC 04 031 50525. The financial results reported on the petitioner's 2001 and 2002 tax returns do not support an argument that it continues to experience business losses from the September 11, 2011 attacks. Although the petitioner's 2001 tax return reports a loss of $81,463, the petitioner's 2002 tax return reports positive net income of $5,315. The petitioner therefore appears to have been in better financial shape in 2002, shortly after the September 11, 2001 attacks, than it is currently, many years after the attacks.

Counsel also cites news articles about the negative effects of the recent financial crisis on restaurants in New York City and elsewhere. Counsel attributes the drop in the petitioner's gross sales from 2008 to 2009 to that economic downturn. But the petitioner's tax returns show that it incurred net income losses in 2007 and 2008, even before the financial crisis hit. The petitioner has also not demonstrated that it is more likely than not that its finances will improve. USCIS therefore finds that the circumstances do not merit a favorable determination under *Sonegawa*.

In conclusion, the evidence submitted does not establish that the petitioner has 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.