U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
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: JUN 19 2013 Office: NEBRASKA SERVICE CENTER [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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The director dismissed a subsequent motion. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition will remain denied.

The petitioner is an Italian style restaurant. The petitioner seeks to employ the beneficiary permanently in the United States as an Italian style specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

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

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

Here, the Form ETA 750 was accepted on November 18, 2003. The proffered wage as stated on the Form ETA 750 is $755.60 weekly based upon a 40 hour work week ($39,291.20 per year). The Form ETA 750 states that the position requires two years of work experience in the job offered or two years of related work experience.

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 and on motion.[1]

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.[2] On the petition, the petitioner claimed to have been established in September 2000 and to employ five workers.[3] According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on November 3, 2003, the beneficiary claims to have worked for the petitioner since August 2002.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary

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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 at 8 C.F.R. § 103.2(a)(1).

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

[3] In the instant case, the petitioner, an LLC formed under New York law, is considered to be a partnership for federal tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

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. As noted in the AAO's previous decision, the petitioner submitted Forms W-2, Wage and Tax Statements that show wages paid in 2003 of $20,770.00, 2004 of $33,750.00, 2005 of $33,750.00, 2006 of $38,250.00, 2007 of $38,250.00, 2008 of $39,000.00, and 2009 of $42,950.00. However, as noted in the AAO's denial, the social security number that appears on the Forms W-2 differ from the social security number found on the beneficiary's IRS Forms 1040 submitted by the petitioner.

Counsel asserts on motion that the beneficiary made up the social security number that appears on the Forms W-2 and that the Forms W-2 and Forms 1040 were received and accepted by the Internal Revenue Service (IRS). Contrary to counsel's claim, there is no evidence in the record to certify that the beneficiary's W-2 forms were sent to and received by the IRS. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The amounts on the Forms 1040 differ from those on the Forms W-2 for the years 2003-2006. These inconsistencies call into question the petitioner's claimed employment of the beneficiary in 2003 through 2009, and the credibility of the Forms W-2. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Without independent objective evidence resolving the inconsistencies, the AAO will not accept the Forms W-2 as persuasive evidence of wages paid to the beneficiary.[4]

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). 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.*

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[4] If the AAO were to accept the Forms W-2 as evidence of wages paid to the beneficiary, the evidence would demonstrate the petitioner's ability to pay the proffered wage in 2009. However, for the years 2003 through 2008, the Forms W-2 submitted do not establish that the petitioner paid the beneficiary the full proffered wage. In 2003, the wages paid were $20,700.00 with a deficiency of $18,521.20; in 2004 wages paid were $33,750.00 with a deficiency of $5,541.20; in 2005 wages paid were $33,750.00 with a deficiency of $5,541.20; in 2006 wages paid were $38,250.00 with a deficiency of $1,041.20; in 2007 wages paid were $38,500.00 a deficiency of $1,041.20; and in 2008 wages paid were $39,000.00 with a deficiency of $291.20.

Food Co., Inc. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. The petitioner, demonstrating that it paid wages in excess of the proffered wage is insufficient to establish that it had the ability to pay the proffered wage.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 is a Limited Liability Company (LLC).[5] The proffered wage is $39,291.20. The petitioner's tax returns stated its net income as detailed in the table below.

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[5] For an LLC taxed as a partnership, where partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other

- In 2003, the petitioner's Form 1065 stated net income of - $14,146.00.
- In 2004, the petitioner's Form 1065 stated net income of $4,443.00.[6]
- In 2005, the petitioner's Form 1065 stated net income of - $42,944.00.
- In 2006, the petitioner's Form 1065 stated net income of - $15,784.00.
- In 2007, the petitioner's Form 1065 stated net income of - $11,896.00.
- In 2008, the petitioner's Form 1065 stated net income of $391.00.

Therefore, from 2003-2008 the petitioner has not established that it has the ability to pay the beneficiary through its net income.[7]

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] An LLC's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of an LLC's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2003, the petitioner's Form 1065 stated net current assets of - $82,936.00
- In 2004, the petitioner's Form 1065 stated net current assets of - $3,436.00.
- In 2005, the petitioner's Form 1065 stated net current assets of - $38,925.00.
- In 2006, the petitioner's Form 1065 stated net current assets of - $42,698.00.
- In 2007, the petitioner's Form 1065 stated net current assets of - $35,027.00.

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adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional deductions in the relevant tax years and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

[6] The net income figures noted above differ from those found in the director's March 17, 2009 decision, in that the director failed to consider the relevant Schedule K net income or loss figures, where they differ from the figure reported on Line 22 of IRS Form 1065 for 2004 and 2005. Therefore, the record will reflect the appropriate corrections.

[7] If the AAO were to consider the Forms W-2 submitted to establish wages already paid, for the years 2003, 2004, 2005, 2006, and 2007, the petitioner would not establish that it had sufficient net income to pay the difference between the wages paid and the proffered wage. In 2008, the petitioner's net income would cover the small deficiency considering the Form W-2.

[8] 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.

Therefore, for the years 2003, 2004, 2005, 2006, and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.[9]

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

On motion, counsel asserts that based upon the totality of the circumstances, the petitioner has established his ability to pay the proffered wage in the relevant years. Counsel further asserts that the evidence should be viewed in its entirety.

Counsel asserts that as a Limited Liability Partnership (LLP), the petitioner's member's assets may be considered in determining the petitioner's ability to pay the proffered wage. Counsel submits as evidence copies of the petitioner's owner's checking account and money market bank statements. Counsel also submits copies of the members' IRS Forms 1040 and IRS Forms W-2, Wage and Tax Statement. Contrary to counsel's claim, on the petitioner's Forms 1065 for the relevant years, the petitioner indicated at Schedule B.1 that it was a "domestic limited liability company." It is an elementary rule that an LLC 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. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, the personal assets or other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. The court 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." *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

An LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.[10] An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. Consequently, assets of its members/managers or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2),

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[9] Nor would the petitioner's net current assets for these years cover the difference between any wages reflected on the Forms W-2 and the proffered wage.

[10] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

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 will be considered below in determining the petitioner's net current assets.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

On motion, counsel reasserts that the USCIS regulations are silent on the issue of allowing the financial resources of individuals or entities who have no legal obligation to pay the wages to be considered when determining the ability to pay the proffered wage; and therefore, the silence may be interpreted as allowing such usage. Counsel asserts that the petitioner is a partnership and as such allows its partners, in the furtherance of business, to make capital and other contributions to the business to pay business obligations in order to preserve the business. Counsel asserts that in order to fulfill a partnership obligation, a partner may make itself individually liable by taking on the obligation. Counsel states that it is universal law that partners or shareholders may make capital or con-capital contributions to the business towards any lawful purpose, such as the payment of salaries and that realistically, a business must borrow from time to time to stay in business and must therefore rely upon the contributions of additional funds over the shareholder's initial investment.

The petitioner submitted a statement signed by one of its owners, [redacted] stating that being a LLC, the petitioner is treated as a partnership by the IRS and therefore it is not a separate entity for income tax purposes to be distinguished from its members and managers. She further stated that the partnership return is merely an informational document. She stated that the members and managers of an LLC can contribute any combination of cash, property or services to the LLC; and that the members' and managers' adjusted gross income, assets and personal liabilities may be considered in determining the petitioner's ability to pay the proffered wage. Although the declarant refers to the personal income tax returns and monthly reoccurring household expenses for 2004 to 2007 of its two members, the record of proceeding does not contain such documents.

While partners/members can make further capital contributions/loans, there is no obligation to do so, and in the instant matter there is no evidence to show that the members have done so. Further, the petitioner cannot change an unapprovable petition into an approvable one by donating money in the future. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date,

but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The petitioner asserts that it can borrow money from its members to pay the beneficiary's wages. 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 amounts that may be borrowed from its owners.[11] 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.

However, if the petitioner wishes to rely on a loan 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 funds 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 loans 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).

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,* 12 I&N Dec. 612. 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. 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.

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[11] As noted above, there is no evidence that any such loans have been made to date.

Assessing the totality of the circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not established that the tax years at issue were uncharacteristically unprofitable or a difficult period for the petitioner's business. The petitioner has not established its reputation within the industry. Finally, there are unresolved inconsistencies surrounding the identity of the beneficiary and the petitioner's claim to have paid wages to him. Accordingly, 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 AAO's prior decision, dated July 23, 2010, is affirmed. The petition remains denied.