

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)

DATE: **MAY 14 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the preference visa petition. After granting the petitioner's motion to reopen and reconsider, the director again denied the petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates an elementary school. It seeks to employ the beneficiary permanently in the United States as a teacher. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

In both denials of the petition, the director determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Because the original denial of the petition was appealable to the AAO, this Office has jurisdiction over the appeal of the decision resulting from the petitioner's motion. *See* 8 C.F.R. § 103.5(a)(6).

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 denials, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), defines the term "profession" to include elementary school teachers.

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 DOL accepted the labor 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 the labor 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 DOL accepted the labor certification on June 8, 2009. The proffered wage, as stated on the ETA Form 9089, is \$63,017 per year. The labor certification states that the position requires a Bachelor's degree, or a foreign equivalent degree, in "English Language Arts and Foreign Languages," plus 36 months of experience in the job offered. The position also requires the ability to speak and write in the Russian language.

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 a C corporation. On the petition, the petitioner claimed to have been established in 1998² and to employ 26 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the ETA Form 9089, signed by the beneficiary on July 3, 2010, the beneficiary claims to have worked for the petitioner in the offered position since August 27, 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any later immigrant petition based on the same 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 wage. 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).

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 Online records of the New York State Department of State, Division of Corporations, show that the petitioner was incorporated on January 5, 2004 under the name [REDACTED] and later changed its name to [REDACTED]. The records also show that the petitioner's shareholders are officers of two other New York corporations: [REDACTED], which was incorporated on January 8, 1999; and [REDACTED], which was formed on August 5, 2008. *See* http://www.dos.ny.gov/corps/bus_entity_search.html (accessed on April 24, 2013).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner provided copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements for 2009, 2010, and 2011. The W-2 forms show that the petitioner paid the beneficiary \$35,375.79 in 2009, \$34,326.85 in 2010, and \$32,993.26 in 2011. Because none of the annual wage amounts equal or exceed the annual proffered wage of \$63,017, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of June 8, 2009 onward. The differences between the wages paid and the annual proffered wage are: \$27,641.21 in 2009; \$28,690.15 in 2010; and \$30,023.74 in 2011.

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). If the net income reflected on the petitioner's federal tax return for a given year, combined with the amount of wages the petitioner paid the beneficiary that year, equal or exceed the annual proffered wage, USCIS will consider the petitioner able to pay the proffered wage that year.

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

Regarding 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of IRS Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 20, 2012 with his receipt of the petitioner’s motion to reopen. As of that date, the petitioner’s 2011 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2010 is the most recent return available.

The petitioner’s tax returns show the following net income amounts: \$156 in 2009; and \$(65,871)³ in 2010. Because the petitioner’s annual net income amounts for 2009 and 2010, combined with the wages it paid the beneficiary in those years, do not equal or exceed the annual proffered wage of \$63,017, the petitioner has not demonstrated sufficient net income to pay the proffered wage since the June 8, 2009 priority date.

If the petitioner’s net income, added to the wages paid to the beneficiary during the period, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁴ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6, and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation’s year-end net current assets and the wages paid to the beneficiary

³ Numbers in parentheses reflect negative amounts.

⁴ 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.

are equal to or greater than the annual 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 the following year-end net current asset amounts: \$(19,642) for 2009; and \$(35,969) for 2010. Because the petitioner's annual net current asset amounts for 2009 and 2010, combined with the wages it paid the beneficiary in those years, do not equal or exceed the annual proffered wage of \$63,017, the petitioner has not established sufficient net current assets to pay the proffered wage.

Therefore, from the date the DOL accepted the ETA Form 9089, the petitioner has not established its continuing ability to pay the proffered wage based on examinations of the wages it paid the beneficiary, its net income, and its net current assets.

Counsel asserts that the director erred in failing to "prorate" the proffered wage in the year of the petition's priority date. Because the petitioner must demonstrate its ability to pay the proffered wage only from the priority date, counsel argues that the petitioner need only show its ability to pay a prorated proffered wage of \$35,628.74 in 2009, which is the amount of the annual proffered wage due after the priority date of June 8, 2009. Counsel argues that the director wrongly disregarded evidence of the petitioner's ability to pay the \$252.95 difference between the wages the petitioner paid the beneficiary in 2009 and the prorated 2009 proffered wage of \$35,628.74, including the petitioner's gross income, gross profit, and cash on hand, as stated in its 2009 tax return.

As the director explained in his July 17, 2012 decision denying the petition after the petitioner's motion to reopen, USCIS will not consider 12 months of net income and the 12 months of wages that the petitioner paid the beneficiary to demonstrate an ability to pay only six months of the proffered wage, from the June 8, 2009 priority date to the end of the year. USCIS will prorate a proffered wage only if the record contains evidence, such as monthly income statements and/or pay stubs, showing that the petitioner generated sufficient net income and/or paid the beneficiary sufficient wages after the priority date of the relevant year. Although counsel argues that the petitioner submitted "extensive documentation" of its net income and its payment of the beneficiary's wages in 2009, the petitioner's evidence does not establish that it generated sufficient net income or paid the beneficiary sufficient wages in 2009 after the June 8, 2009 priority date.

Even if the 2009 annual proffered wage could be prorated, the petitioner has not established its ability to pay the \$252.95 difference between the wages it paid the beneficiary in 2009 and the annual prorated proffered wage. The petitioner's 2009 tax return shows that it generated only \$156 in net income in 2009, and its year-end net current asset amount was negative. Therefore, neither the addition of the petitioner's net income or net current assets to the wages it paid the beneficiary would equal or exceed the 2009 prorated proffered wage, even if all the wages paid to the beneficiary were received after the priority date.

Counsel argues that the petitioner's gross income, gross profits, and cash-on-hand figures for 2009, as stated on its 2009 tax return, demonstrate its ability to pay the difference between the wages paid to the beneficiary and the prorated proffered. Even if the 2009 annual proffered wage could be prorated,

however, USCIS will not consider gross income, gross profits, or cash-on-hand in determining a petitioner's ability to pay the proffered wage without also considering the petitioner's corresponding expenses, deductions, and liabilities. As discussed above, gross income does not reflect business expenses that the petitioner incurred, reducing the income available to pay the proffered wage. See *K.C.P. Food Co.*, 623 F. Supp. at 1084 (holding that the Service properly relied on the petitioner's net income figure, rather than its gross income). Similarly, gross profit does not include business expenses. See *Taco Especial*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because the figure ignores other necessary expenses).

The petitioner's cash-on-hand is also a poor gauge of its ability to pay the proffered wage. The petitioner's cash for 2009 is included in its current assets on Schedule L of its 2009 tax return. USCIS already considered the petitioner's 2009 current assets when it examined the petitioner's year-end net current asset amount above. Considering current assets without examining corresponding current liabilities over the same time period does not provide a true picture of a petitioner's ability to pay the proffered wage. See *K.C.P. Food Co.*, 623 F. Supp. at 1084; *Taco Especial*, 696 F. Supp. 2d at 881 (using similar analysis in rejecting gross income and gross profit figures to establish a petitioner's ability to pay the proffered wage).

Counsel also asserts that the director erred in disregarding the petitioner's 2010 bank statements, which counsel claims demonstrate the petitioner's ability to pay the \$28,690.15 difference between the wages it paid the beneficiary in 2010 and the annual proffered wage. Counsel argues that the petitioner's average monthly bank account balance in 2010 exceeded \$2,390.84, the average monthly amount needed to pay the \$28,690.15 difference over a year.

First, bank statements are not among the three types of evidence that the regulation at 8 C.F.R. § 204.5(g)(2) requires to demonstrate a petitioner's ability to pay a proffered wage. While the 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.

As the director stated in his July 17, 2012 decision, bank statements are not reliable measures of a petitioner's ability to pay the proffered wage because they show only the amount in an account on a given date. The statements do not reflect whether the funds in the account are truly available to pay the proffered wage, or, for example, are needed to pay other imminent expenses. Moreover, the petitioner's 2010 monthly bank statements show that it began the year with \$24,161.47 in the account, but ended the year with only \$1,209.37. The beginning and ending account balances for 2010 suggest that the petitioner's expenses exceeded its revenues by \$22,952.10. The account's balance was also \$(691.49) at the end of November 2010, according to the statements. Thus, while the average monthly account balance in 2010 may exceed the average monthly amount required to pay the difference between the wages paid to the beneficiary and the annual proffered wage, the beginning and ending yearly balances, as well as the ending monthly balances for November and December, indicate that the petitioner could not pay the proffered wage throughout 2010.

In addition, the petitioner did not submit evidence that the funds reported in the bank account reflect additional, available funds not indicated on its 2010 tax return, such as in its taxable income (income minus deductions) or in the cash specified on Schedule L. USCIS already considered both the net income and net current asset amounts, which includes cash, in determining the petitioner's ability to pay the proffered wage. For the foregoing reasons, the AAO finds that the petitioner's bank account statements do not establish its ability to pay the proffered wage in 2010.

Finally, counsel asserts that the director erred in his assessment of the totality of the circumstances affecting the petitioner's business in determining its ability to pay the proffered wage. Counsel argues that the petitioner has demonstrated a good reputation in its field and increasing gross profits and wages paid, but that a temporary dispute with a former shareholder hurt its finances.

As indicated previously, USCIS may consider the overall magnitude of the petitioner's business activities in determining the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. at 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner, however, determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California.

The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record shows that the petitioner has been in business for more than nine years, almost as long as the petitioner in *Sonogawa*. Although the petitioner, in its petition, claimed to be established in 1998, the record shows it was incorporated in 2004. As counsel argues, the petitioner's tax returns show that its gross revenues and the wages it has paid have increased from 2007 through 2010. As evidence of its good reputation, the petitioner submitted a copy of a blog article about its school and a copy of a report indicating that nine of its students exceeded New York State's proficiency standard in mathematics in 2009-10. While this evidence is probative of the petitioner's

ongoing activity as an elementary school, it does not establish that the petitioner has similar renown within the education field as the petitioner in *Sonegawa* had within the fashion industry.

Further, it is not clear how or if the dispute among the shareholders affected the petitioner's ability to pay the proffered wage. The record contains statements from the petitioner's two current shareholders, claiming that their 2008 dispute with a former shareholder generated \$80,000 in legal expenses. The shareholders also state that the dispute's settlement requires them to pay \$410,000 to the former shareholder, at a rate of about \$5,000 a month. According to one of the current shareholders, the former shareholder also sabotaged the petitioner's business, costing it an undisclosed amount of money on its 2008 summer camp program, as well as students for the following academic year. However, there is no evidence in the record of the claimed sabotage, and no evidence of a drop in enrollment caused by that party's actions in 2008 or later. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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).

The record contains a copy of a May 1, 2008 promissory note between the petitioner's two current shareholders and the apparent former shareholder. The note reflects an agreement whereby the former shareholder will loan the current shareholders a total of \$205,000 from June 1, 2008 to May 1, 2009. The agreement requires the current shareholders to repay the loan at a 20-percent interest rate in monthly installments of no less than \$5,000 beginning on June 1, 2008.⁵ The promissory note also does not indicate that it resolves the dispute, or involves the purchase of stock.

The record does not establish that the dispute among the shareholders affected the petitioner's ability to pay the proffered wage. The promissory note and the shareholders' statements indicate that the individual shareholders, as opposed to the corporate petitioner, were parties to the dispute and to the promissory note. A corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). Thus, the corporate petitioner would not be responsible for the debts of its individual shareholders.

The shareholders also claim that the dispute generated \$80,000 in legal expenses. The petitioner's tax returns from 2007 through 2010, however, do not reflect \$80,000 in legal expenses. Rather, the petitioner's returns, at lines 26, "Other deductions," of its IRS Forms 1120, show "professional fees" of \$1,734 in 2007, "legal fees" of \$3,000 in 2008, "legal fees" of \$2,500 in 2009, and "legal and professional fees" of \$1,164 in 2010. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the remaining evidence in

⁵ It is unclear whether the \$410,000 amount that the current shareholders claim they must pay to the former shareholder refers entirely to the loan repayment agreement. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). The record contains no evidence of the claimed \$410,000 amount due. *Id.*, at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

support of the petition). The record contains no evidence of the petitioner's legal fees in the claimed amount of \$80,000. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165, citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190; see also *Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). The AAO therefore finds that the petitioner has not established that the dispute among its shareholders affected its financial ability to pay the proffered wage.

Thus, unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not demonstrated that temporary, uncharacteristic business expenses prevented it from establishing an ability to pay the beneficiary's proffered wage. 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 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.