

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 30 2013**

OFFICE: TEXAS SERVICE CENTER

IN RE:           Petitioner:  
                    Beneficiary:

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

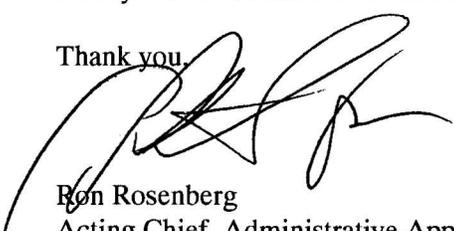
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based Immigrant Petition for Alien Worker (Form I-140) was initially approved by the Director, Texas Service Center. Upon determining that the petition had been approved in error, the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the petition. In the Notice of Revocation (NOR), the director revoked the approval of the preference petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision to revoke the petition's approval will be affirmed.

The petitioner is an automotive repair facility. It sought to employ the beneficiary permanently in the United States as an automotive mechanic. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Labor Certification approved by the Department of Labor (DOL).

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.

For the reasons explained below, the AAO concurs with the director's decision to revoke approval of the petition. The AAO concludes that the petitioner failed to establish its continuing ability to pay the proffered wage.<sup>1</sup>

---

<sup>1</sup> The petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an auto mechanic with [REDACTED] from 1986 to 1989 and with [REDACTED] from June 1980 to December 1986.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from [REDACTED] dated March 8, 2001 which states that the beneficiary worked as a mechanic from 1986 to 1989. The letter does not provide a description of the beneficiary's experience. The record contains a letter from [REDACTED]

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The AAO conducts appellate review on a *de novo* basis. The AAO’s *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.<sup>2</sup>

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

---

Workshops dated April 4, 1997 which states that the beneficiary worked as a mechanic “since the year 1980.” The letter does not provide the end date of the beneficiary’s employment or a description of the beneficiary’s experience. In addition, the name of the employer on this letter is different than the name listed on the Form ETA 750. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states, “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.” The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

<sup>2</sup> 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).

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. Because the filing of a Form ETA 750 labor certification application 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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001, which establishes the priority date. The *bona fides* of the job offer, including such elements as the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the position are essential elements in evaluating whether a job offer is realistic.

In this case, the proffered wage is \$18.70 per hour, which amounts to \$38,896 per year. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record indicates that the I-140 was initially filed on July 30, 2007. It was approved on November 6, 2008.

On July 24, 2009, the director concluded that the I-140 was approved in error and issued a NOIR.

The director found that the petition was deficient because the petitioner had not demonstrated the continuing financial ability to pay the proffered wage of \$38,896 per year. The director requested in his NOIR that the petitioner provide additional evidence as follows:

- 1) Evidence of ability to pay the proffered wage for 2001, 2002, 2003, 2004 and 2005 and
- 2) The petitioner's 2007 and 2008 U.S. corporate federal income tax returns.

The petitioner was afforded thirty days to respond to the director's concerns raised in the NOIR.

On March 30, 2010, the director revoked the I-140's approval pursuant to section 205 of the Act, 8 U.S.C. § 1155. The director concluded that the petitioner's response had not overcome the grounds for the grounds of revocation. Specifically, the director determined that the petitioner had not established its continuing financial ability to pay the proffered wage.

The petitioner appealed the director's decision. Petitioner's counsel asserts that the petitioner has consistently deferred a non-cash item in its financial statements as its rent expense for 2001 through 2005; the amount used in this expense category for 2001 was (\$90,000), 2002 (\$90,000), 2003 (\$90,000), 2004 (\$65,500) and 2005 (\$48,000). Counsel further asserts that these can be used as funds needed to support the petition; and these funds have not been used to support any other expense category and are therefore sufficient to support the necessary financial obligations.

As a preliminary matter, the AAO notes that once USCIS has produced some evidence to show cause for revoking the visa petition, the petitioner still bears the ultimate burden of proving eligibility in a revocation proceeding. We do not find that the director erred in initiating this revocation based on the eligibility of the beneficiary for a skilled worker visa and the petitioner's ability to pay the proffered wage. The court in *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984), additionally stated that "[I]t is important to note that a *visa petition* is not the same thing as a *visa*. An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain the United States." (Citations omitted) (Original emphasis).

As noted above, the petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, April 30, 2001. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).<sup>3</sup> The proffered wage is stated as \$18.70 per hour, which amounts to \$38,896 per year. Part B of the Form ETA 750, signed by the beneficiary on April 26, 2001, indicates that the petitioner employed the beneficiary. The AAO notes that the applicant's Form G-325A, signed on December 11, 2008, and submitted with Form I-485, Application to Register Permanent Residence or Adjust Status, does not list any employment for the five years prior to the signature date, or confirm the beneficiary's prior experience abroad.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner lists the date established as December 22, 1992, but does not list the number of employees as required by the form. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

---

<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.<sup>4</sup> In the instant case, the petitioner has not submitted evidence of the wages, if any, that it paid the beneficiary from the priority date for any year at issue.

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 (1<sup>st</sup> 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

---

<sup>4</sup> The AAO notes that the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker also in 2007 (priority date unknown). Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.<sup>5</sup> The record before the director closed on August 24,

---

<sup>5</sup> The AAO notes that the petitioner's tax returns list its name as Avel Autoworks Corp with an address of 181 First Street, Jersey City, NJ 07302. The AAO notes that this name and address differs from that listed on the Form ETA 750 and Form I-140. The petitioner must resolve these inconsistencies in any further filings. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent

2009, when the director received the petitioner's response to the director's NOIR. As of that date, the petitioner's 2008 tax return was the most recent return available. The petitioner's 2008 tax return, and returns subsequent to that, are not in the record. The petitioner's tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$27,534.
- In 2002, the Form 1120 stated net income of \$(28,802).
- In 2003, the Form 1120 stated net income of \$(15,425).
- In 2004, the Form 1120 stated net income of \$22,990.
- In 2005, the Form 1120 stated net income of \$(97,116).
- In 2006, the Form 1120 stated net income of \$52,909.
- In 2007, the Form 1120 stated net income of \$40,139.

Therefore, for the years 2006 and 2007, the petitioner would appear to have sufficient net income to pay this beneficiary's proffered wage. However, as noted above, the petitioner filed for a second worker, and must establish that it can pay the wage of the other sponsored worker as well. Without evidence related to the other worker's priority date and proffered wage, the AAO cannot conclude that the petitioner can establish its ability to pay the instant beneficiary's and the other sponsored worker's wage in either 2006 or 2007. For the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage. The record is not clear as to its ability to pay the proffered wage based on its net income from 2008 onwards, as the petitioner failed to submit its 2008 tax return.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$6,821.
- In 2002, the Form 1120 stated net current assets of \$(5,616).

---

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.”

<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2003, the Form 1120 stated net current assets of \$(17,646).
- In 2004, the Form 1120 stated net current assets of \$18,568.
- In 2005, the Form 1120 stated net current assets of \$(32,990).
- In 2006, the Form 1120 stated net current assets of \$25,807.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage. The record is not clear as to its ability to pay the proffered wage based on its net current assets from 2007 onwards. The AAO notes that the entire 2007 tax return, specifically Schedule L, was not submitted. Therefore the AAO is not able to determine its net current assets in 2007. The petitioner also failed to submit its 2008 tax return.

Therefore, 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.

As mentioned above, counsel asserts that the petitioner has consistently deferred a non-cash item in its financial statements as its rent expense for 2001 through 2005; the amount used in this expense category for 2001 was (\$90,000), 2002 (\$90,000), 2003 (\$90,000), 2004 (\$65,500) and 2005 (\$48,000). Counsel further asserts that these amounts can be used as funds needed to support the petition; and these funds have not been used to support any other expense category and are therefore sufficient to support the necessary financial obligations. Counsel has provided no basis for this contention. The petitioner has provided no evidence establishing the ownership of the property listed as the petitioner's address on Form ETA 750 and Form I-140.<sup>7</sup> Counsel attempts to use the assets of the individual shareholder as evidence of the petitioner's ability to pay, which is improper. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

Counsel is essentially claiming that the petitioner and shareholder are one and the same, which is not correct. For tax purposes, the corporate petitioner gets a deduction for the rents it pays to the shareholder (which is included in our calculation of net income), and the shareholder shows the rent payments as income on his IRS Form 1040, Schedule E. The shareholder also gets to claim depreciation for the property on IRS Form 1040, Schedule E. Counsel wants us take the net income figure from line 21 of page one of its Form 1120S, and add back rents from line 11. Rents are already accounted for in the calculation of line 21 net income, and there is no evidence that the petitioner could reduce the rent paid to the shareholder (if any) in order to pay the proffered wage. The petitioner must pay the fair rental value for the property. Rents below fair rental value may be adjusted by the IRS. *See I.R.C. § 482.*

In some cases, 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 Sonogawa*, 12

---

<sup>7</sup> The record contains deeds for other properties, but nothing that appears to be the petitioner's address.

I&N Dec. 612 (Reg. Comm. 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. 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, or the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry.

In the instant case, the petitioner's 2001 through 2007 tax returns reflect that the petitioner's net income and net current assets were either negative or fairly low. The Form I-140 does not list the number of employees in order to determine the relevancy of the salaries and wages in the tax returns. The petitioner sponsored a second worker and must establish that it can pay the second worker as well. The record does not include evidence of any unusual events that temporarily disrupted the business.

Considering these factors and the prior discussion of ability to pay the proffered wage, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. The revocation is based on the petitioner's failure to establish its continuing ability to pay the proffered wage.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record did not establish the petitioner's ability to pay the beneficiary's proffered wage as set forth above at the time the decision was rendered, warranted such denial.

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.