

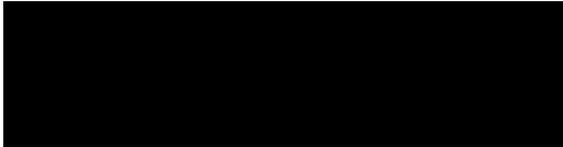


U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 16 2005
WAC-03-003-54359

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Japanese publication company, producing publications for Japanese speakers in California. It seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel states that although the petitioner's net taxable income was negative in the year 2001, the petitioner is a viable business enterprise which has a history of generating significant net income, and that the petitioner has the ability to pay the proffered wage.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is May 29, 2001. The proffered wage as stated on the Form ETA 750 is \$27.00 per hour, which amounts to \$56,160.00 annually. On the Form ETA 750 Part B, signed by the beneficiary on May 8, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing until the date of the ETA 750 Part B.

On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of \$2,966,588.00, and to currently have 30 employees. The item on the petition for net annual income was left blank.

In support of the petition, the petitioner submitted a copy of a Form I-129 approval notice dated November 24, 1999 issued to the petitioner for employment of the beneficiary; copies of W-2 Wage and Tax Statements showing compensation received by the beneficiary from the petitioner for 2001 and 2002; a copy of a statement dated December 31, 2001 of the Bank of the West, Torrance, California, for an account of the petitioner; and a letter dated September 4, 2002 from the petitioner's president confirming a job offer to the beneficiary.

In a request for evidence (RFE) dated December 30, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage.

In response, the petitioner submitted an additional copy of the Form I-129 approval notice dated November 24, 1999 issued to the petitioner for employment of the beneficiary; a copy of an I-94 card showing an entry of the beneficiary into the United States on February 24, 2002; a letter dated September 4, 2002 describing the petitioner's business; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001; copies of quarterly taxable wage tables of the petitioner for the last two quarters of 2001 and the first two quarters of 2002; a copy of the petitioner's City of Los Angeles Tax Registration Certificate issued January 10, 1998; a copy of the petitioner's California State Board of Equalization Seller's Permit dated August 1, 1989; a copy of a Bachelor of Arts degree granted to the beneficiary by the University of California, Berkeley, on December 17, 1998, with accompanying course transcript; a copy of an Associate in Arts degree granted to the beneficiary by the Monterey Peninsula College on August 9, 1996, with accompanying course transcript, copies of W-2 Wage and Tax Statements showing compensation received by the beneficiary from the petitioner for 1999 and 2000, with an additional copy of the beneficiary's W-2 Wage and Tax Statement for 2001 which had been submitted previously; copies of pay statements of the petitioner for the beneficiary dated June 21, 2002, July 6, 2002 and July 23, 2002; a copy of a Certificate of Eligibility for Nonimmigrant Student (Form I-20) issued by the University of California, Berkeley, dated May 28, 1997, with an admission stamp of the Immigration and Naturalization Service dated January 16, 1998; an Employment Authorization Document of the beneficiary dated February 1, 1999; copies of several pages of the beneficiary's Japanese passport; copies of advertising rates and promotional materials of the petitioner; printed copies of three editions of Bridge USA magazine published by the petitioner, dated June 1, 2003, June 15, 2003, and July 15, 2001; and one printed copy of the 2003 edition of the Bridge USA Telephone and Maps publication.

The petitioner's submissions in response to the RFE were received by CIS on March 12, 2003.

In a decision dated May 19, 2003 the director found that the information on the petitioner's tax return for 2001 failed to establish the petitioner's ability to pay the proffered wage that year, which was the year of the priority date. The director accordingly denied the petition.

On appeal, counsel submits a brief in the form of a letter dated June 16, 2003 and the following evidence: an additional copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001; copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 1999 and 2002; copies of three articles discussing revenue difficulties of magazines and other mass media outlets during the year 2001, downloaded from Internet Web sites on June 11, 2003; copies of several pages from The Magazine Handbook, 2002-2003, published by the Magazine Publishers of America; copies of monthly statements of the Bank of the West, Torrance, California, for an account of the petitioner for the months of September 2002 through May 2003; copies of monthly statements of the United California Bank for an account of the petitioner for the months of January 2001 through September 2002, but lacking June 2002; a copy of the petitioner's Business Plan and Expansion Program for 2003; copies of the cover pages of the editions of

Bridge USA magazine dated June 1, 2003 and June 15, 2003, and of the cover page of the 2003 edition of the Bridge USA Telephone and Maps publication.

Counsel states on appeal that the petitioner is a viable business enterprise which has a history of generating significant net income, and that the petitioner has the ability to pay the proffered wage. Counsel states that the negative net income of the petitioner in 2001 was a reflection of overall difficulties in the United States economy that year, and of the particular difficulties faced by the magazine industry. Counsel also states that the petitioner normally receives significant advertising revenue from Japanese companies targeting Japanese travelers to the United States, and that its revenue from those companies declined in 2001 with the decline of Japanese travelers after September 11, 2001. The petitioner states that the information in the petitioner's tax returns from 1997 through 2002 shows that the petitioner has a history of positive net income.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on May 8, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing until the date of the ETA 750B. The beneficiary's statement is corroborated by copies of the beneficiary's W-2 Wage and Tax Statements showing compensation received from the petitioner of \$7,442.00 in 1999; \$21,265.42 in 2000; \$28,351.05 in 2001; and \$29,773.80 in 2002. Further corroboration of the beneficiary's employment is found in copies of the quarterly wage tables of the petitioner for the last two quarters of 2001 and the first two quarters of 2002, and in copies of pay statements of the beneficiary dated June 2, 2002, July 6, 2002 and July 23, 2002, all of which show salary payments consistent with the information on the W-2 Wage and Tax Statements. None of the evidence related to the beneficiary's employment shows compensation at the level of the proffered wage of \$56,160.00. Therefore that evidence fails to establish the petitioner's ability to pay the proffered wage.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, 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. 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence pertaining to the beneficiary's employment discussed above establishes that the beneficiary received \$28,351.05 in compensation from the petitioner in 2001. The amount needed to raise the beneficiary's salary to the proffered wage of \$56,160.00 that year is the difference between the proffered wage and the compensation actually received, a difference of \$27,808.95.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The only tax return of the petitioner submitted prior to the director's decision was the Form 1120 U.S. Corporation Income Tax Return for 2001. That return shows the amount of -\$177,277.00 for taxable income on line 28. Since that figure is negative it fails to establish the petitioner's ability to pay the proffered wage that year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's tax return for 2001 yield the following amounts for net current assets: \$443,980.00 for the beginning of 2001; and -\$152,430.00 for the end of 2001. The petitioner's net current assets at the beginning of 2001 are significantly greater than the amount of \$27,808.95 needed to raise the beneficiary's compensation to the proffered wage in 2001. However, the petitioner's net current assets at the end of 2001 were negative in a significant amount. Therefore the petitioner's tax return for 2001 fails to establish the petitioner's continuing ability to pay the proffered wage after the priority date.

The record before the director closed on March 12, 2002, with the submission of the petitioner's response to the RFE. As of that date the petitioner's tax return for 2002 was not yet due. Therefore the tax return for 2001 was the most current return then available.

The record before the director contained a copy of a statement dated December 31, 2001 of the Bank of the West, Torrance, California, for an account of the petitioner. That statement show a beginning balance on December 1, 2002 of \$26,179.21 and an ending balance of \$70,828.01, with an average daily balance of \$47,853.00.

Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, only a single monthly bank statement was submitted in evidence, therefore no evaluation can be made based on the bank statement of the petitioner's continuing ability to pay the proffered wage after the priority date.

The evidence submitted prior to the director's decision therefore is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date, but it is not sufficient to establish the petitioner's ability to continue to pay the proffered wage until the beneficiary obtains lawful permanent residence.

As discussed above, the record before the director contained W-2 Wage and Tax Statements showing compensation received from the petitioner of \$7,442.00 in 1999; \$21,265.42 in 2000; \$28,351.05 in 2001; and \$29,773.80 in 2002. On the ETA 750B the beneficiary states that her current employment with the petitioner is as "commercial/graphic designer." That job title is nearly the same as the proffered job, which is "graphic designer." The record contains a copy of an approval notice dated November 24, 1999 issued to the petitioner on behalf of the beneficiary, in the H1B1 visa category. This evidence indicates that the beneficiary has been working for the petitioner under an approved I-129, with an H-1B visa. The duties described by the beneficiary on the ETA 750 Part B, for her current employment are very similar to those for the offered position as stated by the employer in block 13 of the ETA 750 Part A. In a letter dated September 4, 2002 the petitioner's president describes the duties of the offered position and the duties of her present position. The duties of the offered position as described in that letter differ somewhat from those described as the duties of the beneficiary's current position. However, on the ETA 750 Part B the description of the beneficiary's current duties are nearly identical to those described in the president's letter for the offered position.

As part of the H-1B visa petition process, the petitioning employer must submit a Labor Condition Application, Form ETA 9035, on which the employer states the wage to be paid to the beneficiary and attests that the wage is at least the level of the prevailing wage for that occupation or the level of the wages which it customarily pays employees in that occupation, whichever is higher. The approval of the Labor Condition Application by the Department of Labor does not imply that the Department of Labor has confirmed the accuracy of the attestations made by the petitioning employer. *See* Employment and Training Administration, U.S. Department of Labor, *H1B Specialty (Professional) Workers*, <http://workforsecsecurity.doleta.gov/foreign/h-1b.asp> (accessed March 11, 2005). The Form ETA 9035 states immediately below the signature line for the Department of Labor certifying official, "The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified labor condition application." *See* Employment and Training Administration, U.S. Department of Labor, *Form 9035*, page 3, <http://workforsecsecurity.doleta.gov/foreign/pdf/eta9035v50.pdf> (accessed March 11, 2005).

The record in the instant petition does not include copies of the petitioner's Form I-129's on behalf of the beneficiary, but CIS electronic records show the offered wage for those petitions. On the first petition, filed September 17, 1999, the offered wage is \$18,512.00. On the second petition, filed October 27, 2003, the offered wage is \$29,755.00. Those figures represent the petitioner's attestation of the current prevailing wage for the offered position under the I-129 petitions. That position is the beneficiary's current position. As noted above, the duties of the beneficiary's current position as described on the Form ETA 750 Part B are nearly identical to the duties of the position being offered in the instant I-140 petition, as described in the letter dated September 4, 2002 from the petitioner's president. However, the actual prevailing wage for the position of graphic designer, as certified by the U.S. Department of Labor in its July 11, 2002 approval of the ETA 750 supporting the instant I-140 petition is \$56,160.00. That amount is \$26,405.00 more than the amount of \$29,755.00 stated as the prevailing wage for the beneficiary's position on the petitioner's I-129 petition filed a year and four months later on October 27, 2003.

Concerning labor certifications as prerequisites to I-140 petitioner, the regulation at 20 C.F.R. § 656.20, states in pertinent part:

(c) Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

(1) The employer has enough funds available to pay the wage or salary offered the alien;

(2) The wage offered equals or exceeds the prevailing wage determined pursuant to Sec. 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work. . . .

(emphasis added).

Although the petitioner stated on the Form ETA 750 that it intends to pay the beneficiary the prevailing wage when the alien begins work under the I-140 petition, the evidence in the record indicates that the petitioner has not been paying the beneficiary the prevailing wage for her work on an H-1B visa under the I-129 petitions, despite its attestations on those petitions that it would do so.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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 record contains no explanation for the inconsistent evidence concerning the prevailing wage noted above.

For the foregoing reasons, even if the petitioner's evidence were sufficient to establish its ability to pay the proffered wage during the relevant period, the evidence fails to establish that the petitioner intends to pay the beneficiary the prevailing wage upon commencement of her employment under the I-140 petition, as required by 20 C.F.R. § 656.20(c)(2).

In his decision, the director correctly found that the petitioner's 2001 tax return showed a negative net income figure, which was therefore insufficient to establish the petitioner's ability to pay the proffered wage in 2001. The director considered the petitioner's cash assets at the end of the year. However, the director failed to calculate the petitioner's net current assets for either the beginning of the year or for the end of the year. The director's analysis of the petitioner's tax return was therefore incomplete.

The director considered the evidence pertaining to the beneficiary's employment and correctly found that the amount of compensation paid to the beneficiary was less than the proffered wage, and therefore failed to establish the petitioner's ability to pay the proffered wage. The director made further findings that the evidence of the beneficiary's compensation showed that the petitioner "has not [sic] intent of ever paying the applicant the full wage." (*See* Director's Decision, page 3). The director reasoned that by submitting the Form ETA 750 Application for Alien Employment Certification the petitioner certified that the wage paid to the beneficiary would equal or exceed the prevailing wage "upon commencement of employment." (*See* Director's Decision, page 3).

The director's reference to "commencement of employment" failed to clarify whether the director was referring to the petitioner's obligations under its I-129 petitions or its obligations under the instant I-140 petition. In a case in which a potential beneficiary is already working for a petitioner at a different position than the offered job, a petitioner is not required to pay the proffered wage stated in the I-140 petition until the commencement of employment under the I-140 petition. In the instant case, however, the evidence summarized above indicates that the beneficiary's current temporary position under an I-129 petition is the same as the permanent position offered under the I-140 petition. The petitioner's apparent failure to pay the prevailing wage as required under the I-129 petition is therefore relevant to its intention to pay the proffered wage under the instant I-140 petition.

Although the analysis of the director was incorrect with regard to the matters discussed above, the decision of the director to deny the petition was correct, since the evidence in the record before the director failed to establish the

petitioner's ability to pay the proffered wage after the priority date and continuing until the beneficiary obtains lawful permanent residence, and failed to establish the petitioner's intention to pay the beneficiary the proffered wage upon the commencement of employment under the I-140 petition.

On appeal, counsel submits additional evidence pertaining to the petitioner's ability to pay the proffered wage. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764.

Nonetheless, even if the evidence submitted on appeal were properly before the AAO, it would fail to overcome the decision of the director.

Nothing in the petitioner's evidence on appeal addresses the finding in the director's decision that the evidence fails to establish the petitioner's intention to pay the proffered wage upon commencement of employment under the I-140 petition. In his brief, counsel summarizes the findings of the director on that point and states that the petitioner's letter dated March 10, 2003 submitted in response to the RFE explains that the beneficiary was being remunerated according to the terms of her H-1B employment. (Brief, page 2). But counsel offers no response to the director's finding that the compensation actually paid to the beneficiary under her H-1B employment has been significantly lower than the prevailing wage, and no evidence submitted on appeal is relevant to this issue.

For this reason, even if the evidence submitted on appeal were properly before the AAO, it would fail to establish that the petitioner intends to pay the beneficiary the proffered wage under the I-140 petition, as required by 20 C.F.R. § 656.20(c)(2).

The evidence submitted on appeal relates to the issue of the petitioner's ability to pay the proffered wage. That evidence includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 1999, 2001 (an additional copy of the return submitted previously) and 2002. The petitioner's tax returns show the following amounts for taxable income on line 28 taxable income before net operating loss deduction and special deductions: \$66,966.00 for 1997; \$11,185.00 for 1998; \$30,075.00 for 1999; \$15,457.00 for 2000; -\$177,277.00 for 2001; and \$70,407.00 for 2002. Calculations based on the Schedule L's attached to the petitioner's tax returns for those years yield the following figures for net current assets: \$178,215.00 for the end

of 1997; \$218,033.00 for the end of 1998; \$165,421.00 for the end of 1999; \$443,980.00 for the end of 2000; -\$152,430.00 for the end of 2001; and -\$140,804.00 for the end of 2002.

The evidence submitted on appeal also includes copies of three articles discussing magazine revenue difficulties during the year 2001, and copies of several pages from *The Magazine Handbook, 2002-2003*, published by the Magazine Publishers of America. The articles and the handbook describe the difficulties faced by the magazine industry and by certain broadcast media in the year 2001, principally due to a weak United States economy during the entire year, but exacerbated by the events of September 11, 2001.

The evidence on appeal also includes copies of monthly statements of the United California Bank for an account of the petitioner for the months of January 2001 through September 2002, but lacking June 2002; and copies of monthly statements of the Bank of the West, Torrance, California, for an account of the petitioner for the months of September 2002 through May 2003. The petitioner's account number on the United California Bank statements is the same as that on the Bank of the West statements, and the closing balance on the last United California Bank statement matches the opening balance on the first Bank of the West statement. The change of bank name on the account to Bank of the West therefore appears to be the effect of a merger of the two banks.

On the petitioner's bank statements the ending balances are as follows:

2001:	Ending balances	2002 (cont)	Ending balances
January	\$25,355.91	April	\$56,582.98
February	\$20,976.44	May	\$48,625.79
March	\$34,173.64	June	\$41,812.45*
April	\$43,875.51	July	\$45,778.34
May	\$55,637.16	August	\$46,903.88
June	\$82,926.10	September	\$17,916.29
July	\$74,256.87	October	\$31,734.51
August	\$30,483.14	November	\$26,179.21
September	\$19,999.52	December	\$70,828.01
October	\$45,362.47		
November	\$15,849.20	2003	
December	\$59,289.23	January	\$32,936.68
		February	\$22,714.42
2002		March	\$7,494.06
January	\$60,074.47	April	\$26,355.06
February	\$18,575.17	May	\$11,076.44
March	\$21,323.09		

*No bank statement for June 2002 was submitted, therefore the ending balance for June 2002 is taken from the opening balance on the July 2002 statement.

The ending bank balances for December 2001, of \$59,289.23, and for December 2002, of \$70,828.01, are higher than the amount of cash shown in the year-end assets portions of the Schedule L's attached to the petitioner's tax returns for 2001 and 2002, which show year-end cash as \$13,679.00 for 2001 and \$44,220.00 for 2002. The record contains no explanation of these inconsistencies. See *Matter of Ho*, 19 I&N Dec. 582, 591-592.

The evidence on appeal also includes a copy of the petitioner's Business Plan and Expansion Program for 2003. That document contains business projections of the petitioner, including plans to increase the distribution of Bridge magazine and plans to sponsor cultural and sporting events in the Los Angeles area in 2003.

Counsel asserts in his brief that the petitioner's evidence satisfies the criteria in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel asserts that the petitioner's business was affected disproportionately by the general decline in international following the events of September 11, 2001, because many of the petitioner's advertisers are Japanese companies which reduced their advertising spending significantly as the number of travelers from Japan to the United States declined after September 11, 2001.

The publications of the petitioner in evidence include three printed copies of editions of Bridge Magazine, for June 1, 2003, June 15, 2003 and July 15, 2003. Each issue is of about 130 pages, with the majority of pages containing advertisements in Japanese. No certified English translations are provided, but the English language portions of the advertisements indicate many advertisements for restaurants, airline travel, English language classes, and Japanese automobiles, along with many other products and services. Also in the record is a printed copy of 2003 edition of the Bridge USA Telephone and Maps publication, a publication of 1168 pages. The advertisements in that publication are similar to those in the magazines. The petitioner's publications in the record therefore support counsel's assertions that the petitioner's business is heavily dependent on advertisements directed at Japanese persons in the United States.

The petitioner's evidence submitted on appeal is sufficient to establish that the petitioner's weak financial figures in 2001 were at least partially the result of temporary factors. The evidence indicates that the petitioner achieved a positive net income in 2002, and that although its net current assets at the end of 2002 were still negative, they were improved over those at the end of 2001. Nonetheless, the petitioner's financial situation both in 2001 and in 2002 reflect its apparent failure to pay the beneficiary the prevailing wage as required under her H-1B visa, as discussed above. Had the petitioner done so, its financial figures would have been weaker for each of those years. For this reason, the evidence is not sufficient to establish the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612.

In summary, even if the petitioner's evidence submitted on appeal were properly before the AAO, the evidence fails to establish the petitioner's intention to pay the beneficiary the proffered wage and also fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The evidence submitted on appeal therefore fails to overcome the decision of the director.

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.