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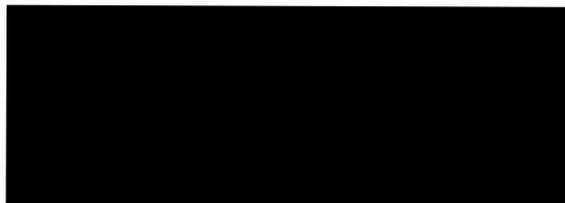
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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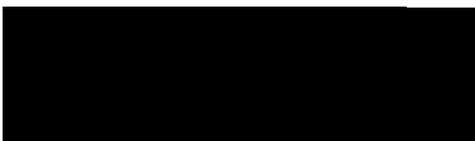
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FILE: WAC 04 144 50370 Office: CALIFORNIA SERVICE CENTER Date: **AUG 24 2006**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a framing services company. It seeks to employ the beneficiary permanently in the United States as a gilder. 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, new counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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, the day 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). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15.29 per hour, which amounts to \$31,803.20 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 2000, 2001, and 2002. These documents indicated the petitioner had taxable income before net operating loss deduction and special deductions of \$267 in tax year 2000, -\$9,703 in tax year 2001, and -\$23,203 in tax year 2002.¹ The petitioner also submitted a letter of work verification from an unidentified manager of Ziba Frame Company that stated the beneficiary worked in the manufacture and production of metallic and wooden frames, as well as painting and decoration of frames from April 24, 1983 to November 27, 1986. The petitioner also submitted bank statements from Bank of America and US Bank for periods of time from June 2003 to September 2003, and from June 2001 to September 2003, respectively. The petitioner also submitted Form DE-6, Quarterly Wage and Withholding Report, for the state of California for all four quarters of 2003, as well as a Form W-3 that

¹ Since the priority date for the instant petition is April 27, 2001, the petitioner's tax return for tax year 2000 is not dispositive in these proceedings. It will not be examined further.

indicated wages of \$700,477 paid in tax year 2002. Finally the petitioner submitted documentation of its incorporation in 1985.

In a cover letter submitted with the petition, counsel examined the petitioner's gross income, total income, compensation of officers, and amounts paid by the petitioner in salaries and wages. She stated that in 2000, the petitioner's gross income was \$1,894,906, its total income was \$1,079,786, the compensation of officers was \$256,800, and wages and salaries paid was \$556,746; that, in 2001, the petitioner's gross income was \$1,534,282, its total income was \$927,220, its compensation of officers was \$178,000, and salaries and wage paid were \$490,389; and that in 2002, the petitioner's gross income was \$1,438,849, its total income was \$877,187, its compensation of officers was \$373,437, and that salaries and wages paid were \$246,767. Counsel stated that such evidence established that the petitioner had the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 9, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide evidence as to its ability to pay the proffered wage in 2003, and stated that the petitioner could submit copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. The director also requested copies of the petitioner's Form DE-6 Quarterly Wage Report, for the last quarter accepted by the state of California that included the names, social security numbers, and number of weeks worked by all employees.

The director also stated that the letter of work verification submitted by the petitioner failed to state the employer's address and the identity of the person verifying the beneficiary's work experience. The director noted that the Part B of Form ETA 750 indicated the beneficiary had worked for Frederick Home Improvement in Woodland Hills, California from June 1998 to the present on a full-time basis. The director then requested the petitioner submit a copy of the beneficiary's signed, dated, and certified federal tax returns from 1998 to the present, and stated that the tax returns had to include copies of the beneficiary's W-2 Forms. The director stated that the petitioner could also submit the beneficiary's Social Security Administration detailed earnings printout of the beneficiary's employment history.

Finally the director noted that regulations published in *The Federal Register*, Vol. 67, No.215, dated November 6, 2002 required nonimmigrant males over the age of 16 who are nationals or citizens of Iran, Iraq, Libya, Sudan, or Syria to be registered in the National Security Entry-Exit Registration System (NSEERS) by February 7, 2003, or at time of entry thereafter. The director stated that the beneficiary was subject to this requirement, and requested the petitioner provide a copy of the front and back of the beneficiary's Arrival-Departure record (Form I-94) that indicates the NSEERS registration. The director then stated that if the petitioner believed the beneficiary was not subject to this requirement, to submit an explanation of why he was not subject to the requirement with further evidentiary documentation.

In response, the petitioner submitted its Form 1120 corporate tax return for the year 2003. This document indicated the petitioner had taxable income before net operating loss deduction and special deductions of \$15,355. The petitioner submitted additional Bank of America bank statements for July 2003 to August 2004, as well as Forms DE-6 from the first quarter of 2003 to the first quarter of 2004. All Forms DE-6 indicated the petitioner had 17 employees, and provided their names and social security numbers. The petitioner also submitted a second

translation of what appears to be the original letter of work verification that identified the manager of the Ziba Frame Company as Seyed [REDACTED]. The petitioner also submitted a translated certificate of completion of a vocational training course in carpentry and frame production from Teheran, Iran.

With regard to the beneficiary's wages, the petitioner submitted the beneficiary's social security statements from the U.S. Social Security Administration for the years 2001 and 2002. These statements indicated the beneficiary earned \$8,610 in 2001 and \$6,146 in 2002.

In her cover letter to the evidence submitted in response to the director's request for further evidence, counsel stated that the petitioner's gross income for year 2003 was \$1,832,297, that wages paid by the petitioner in 2003 was \$265,135, and that the petitioner's officers were compensated \$585,650. Counsel also stated that the petitioner's average monthly bank statement balances are \$114,015. Counsel then noted that the owner of Federal Home Improvement is the beneficiary's brother and the beneficiary worked for his brother without getting paid in exchange for free accommodations. Counsel also noted that the beneficiary is a Canadian citizen and he entered the United States at Detroit, Michigan, without inspection. Counsel states that the regulations published in *The Federal Register* required nonimmigrant males over the age of 16 who were nationals of Iran, Iraq, Sudan or Syria and who entered the United States legally to register in the NSEERS program. Counsel asserted that since the beneficiary entered the United States without inspection, he was not subject to the NSEERS registration. The AAO also notes that the NSEERS requirement related to the beneficiary's admissibility and not to whether he is qualified for the proffered position.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 11, 2004, denied the petition. The director examined the petitioner's 2001, 2002, and 2003 federal tax returns.² With regard to tax year 2001, the director stated that the petitioner had negative taxable income and the Schedule L contained in the petitioner's tax return indicated no current assets. With regard to tax year 2002, the director stated that petitioner had negative taxable income of -\$23,203 and that the corresponding Schedule L showed no current assets. For tax year 2003, the director stated that the petitioner had taxable income of \$15,355, which was less than the proffered wage of \$31,803.20. The director also noted that the Schedule L of the tax return indicated negative current assets.³ The director determined that the petitioner had not established its ability to pay the proffered wage as of the 2001 priority date and to the present.

On appeal, new counsel submits the first page of the petitioner's tax returns for tax year 2001, 2002, and 2003, along with Statement Three, Form 1120, Page 2, Schedule A, Line 5-Other Costs, for the respective years. Counsel states that the evidence of salaries and wages paid to current employees should have been considered as evidence of the petitioner's ability to pay the proffered wage. Counsel states that the petitioner's four tax returns establish that it is a viable business and that its gross income each tax year was either one and a half million

² Since the priority date of the instant petition is April 27, 2001, the director did not analyze the petitioner's 2000 federal income tax return that was submitted with the initial petition.

³ While the director's statements with regard to the petitioner's negative current assets are correct, the AAO examines both current assets and current liabilities in examining the petitioner's net current assets. The AAO will discuss the analysis of the petitioner's net current assets further in these proceedings.

dollars or higher. Counsel notes that the petitioner had been paying over \$260,000 in salaries and wages and over \$36,000 in worker's compensation insurance for the petitioner's employees, and that the proffered wage is less than the amount paid for worker's compensation. Counsel also states that the services of a gilder will achieve higher profits and produce more sales for the petitioner. Counsel cites to *Elatos Restaurant Corp. etc. v. Sava*, 632 F. Supp 1049 (S.D.N.Y. 1986) and states that the court in this decision stated that the petitioner had the responsibility to submit more conclusive evidence such as cash flow data or certified financial statements to clarify the income figures reflected on the return and thus apprise Citizenship and Immigration Services (CIS) more definitively of its financial position. Counsel states that CIS is still utilizing the outdated approach of only looking at the petitioner's net income, and that net income does not reflect whether employers who are in a service business are able to afford their labor. Counsel then refers to Schedule C of tax returns that indicate profit and loss from business, and that include expenses of labor and material in calculation of losses.⁴ Counsel states that CIS continues to ignore the cost of materials as a factor to be considered in determining the petitioner's ability to pay the proffered wage and as a result is denying meritorious claims.

Counsel states in that in 2003, the petitioner's cost in purchasing materials and moldings alone was \$580,100, approximately one third of its gross income. As such, counsel states this amount signifies a great expense for the petitioner that it necessary and unavoidable since the petitioner cannot find a U.S. worker able to perform the duties of a gilder. Counsel states that by hiring the beneficiary, the petitioner could save 50 percent to 70 per cent of its costs and could raise its net revenues.

Counsel submits two letters to the record. The first letter is from _____ owner, Art's Custom Flooring, Glendale, California. _____ states that there are several different types of molding, including baseboard-casing, crown, and framing moldings. He provides a breakout of the costs of buying premade moldings versus the costs of manufacturing moldings in-house. He estimates a savings of \$3.20 per linear foot for oak wood molding for an average molding design, a 50 to 60 percent savings. The second letter is written by _____ Vice President, _____ California. _____ states that he has 20 years of experience in making and selling molding, columns, and cabinets, and that if moldings are made in-house the cost is approximately 70 per cent less than purchasing it from another company.

Counsel states that the petitioner was not able to submit these documents earlier in the proceedings since the petitioner never received a Notice of Intent to Deny the petition. Counsel states that employers now have little recourse to fully present their case. Counsel states that while the reliance of the CIS on tax returns is not erroneous by itself, its determination in the instant petition is based on net income alone and not on other parts of the tax returns such as Schedules C that demonstrate business expenses, i.e., cost of labor and material.

Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Com. 1967) and states in this decision the court stated that net profit does not in itself preclude the *Sonogawa* petitioner from establishing that she will be able to meet the conditions of the job certification and that the court took into consideration that the petitioner had been making a living for herself and employing from four to eight employees without any evidence of financial

⁴ It is not clear why counsel refers to Schedule C in her analysis of the petitioner's ability to pay the proffered wage. Schedules C do not accompany Forms 1120, but rather the Form 1040 individual federal tax form, submitted by sole proprietors.

difficulties. Counsel states that in the instant petition, the petitioner has demonstrated paying salaries and wages in the amount of \$265,000, demonstrated paying workers compensation insurance of \$36,000 and demonstrated spending \$580,000 in cost of materials and moldings. Counsel states that the petitioner, based on its gross income, has proven it can pay the salary and is a viable business. Finally counsel cites to *Denver Tofu Co. V. INS*, 525 Supp. 254 (D.Col. 1981) and states that the court criticized legacy INS, now CIS, for taking a mechanical approach in considering an alien's qualifications. Counsel states that CIS has taken the mechanical approach in the instant petition by denying the petition based on the petitioner's net income alone. Counsel states that CIS could and should have considered the petitioner's cost of materials as it comprises one third of the petitioner's gross profits. Counsel states that in the instant petition, tax records clearly reflect cost of moldings and materials that could be decreased by hiring an employee to produce them in-house.

Counsel on appeal suggests that CIS bases its decisions on employment-based I-140 petition on an examination of the petitioner's net income alone. In addition to an examination of the petitioner's net income, which includes the petitioner's gross profits, and total income before net operating loss deduction and special deductions, CIS will examine both the petitioner's payment of a salary equal or greater than the proffered wage to the beneficiary as a method of establishing the petitioner's ability to pay the proffered wage, as well as examine the petitioner's net current assets, which includes both the petitioner's assets and liabilities as identified on the petitioner's Schedules L for the respective tax returns. Although counsel twice refers to Schedule Cs and the portrayal of costs and expenses on this tax document, the petitioner is structured as a corporation and does not file a Schedule C with its IRS Form 1120. Therefore counsel's references to this document are irrelevant. Furthermore, counsel's comments that CIS should consider the petitioner's costs of materials and labor in its examination of the petitioner's ability to pay the proffered wage also are erroneous. As will be discussed further in these proceedings, CIS does consider the petitioner's costs of materials and labor when it analyzes the petitioner's net income. Furthermore, the petitioner's costs of materials and labor are considered a normal consequence of doing business, and not as evidence in and of themselves of the petitioner's ability to pay the proffered wage.

Counsel on appeal also submits two letters to the record from owners of framing businesses to establish that the beneficiary's employment as a gilder will impact significantly on the petitioner's business expenses based on the in-house production of molding. However, the record is confused as to the relationship between the job duties of a gilder and that of an in-house molding producer. The Form ETA 750 states the following job duties for the beneficiary: "Cover surface of item with metal leaf, such as aluminum, gold, and silver to decorate them, using brushes T-shaped hand tool. Rubs camel-hair brush in hair to electrify brush and picks up leaf with brush and smoothes leaf over surface and removes excess, using brush". These job duties contrast significantly with the in-house production of frames or any other type of molding. In addition, neither counsel nor the petitioner provides any clarification as to the current use of gilding in the petitioner's framing business, and its future production based on the beneficiary's prospective employment. Counsel's comments as to the ability to the petitioner to cut down on its expenses by employing the beneficiary as a gilder appear unfounded. Thus, little weight is given to the two letters submitted to the record on appeal.

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statements for its checking account. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases,"

the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return.

Counsel also states on appeal that the petitioner was not provided the opportunity of receiving a Notice of Intent to Deny the petition, and thus was unable to submit further documentation. However, the record clearly reflects that the petitioner received a Request for Further Evidence with request for information on the petitioner's ability to pay the proffered wage, and whether the petitioner had paid the beneficiary any wages since the priority date.⁵ The petitioner could have provided more evidence at the time of the request for further evidence, and on appeal.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. The beneficiary did not indicate on ETA Form 750 that he had worked fulltime for the petitioner. The Social Security Administration statements requested by the director⁶ and submitted by the petitioner for the beneficiary do not indicate that the petitioner paid any wages to the beneficiary in either 2001 or 2002. Therefore, the petitioner did not establish that it employed and paid the beneficiary a salary equal to or greater than the proffered wage as of April 2001 and onward.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. 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). Contrary to counsel's assertion, reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation

⁵ This issue is more fully discussed in the following paragraph.

⁶ The record is not clear why the director requested the beneficiary's Social Security Administration statements for the priority year or for any tax year in question. Such statements do not provide the names of employers, only the wages earned during the time in question.

expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. The petitioner in tax years 2001, 2002, and 2003 had the following taxable income: -\$9,703, -\$23,203, and \$15,355. None of these figures is sufficient to pay the proffered wage of \$31,803.20.

However, contrary to counsel's assertion, the petitioner's net income is not the only statistic that CIS uses to examine a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 a corporation's end-of-year 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 tax returns reflect the following information for the following years:

	2001	2002	2003
Taxable income ⁸	\$ -9,703	\$ -23,203	\$ 15,355
Current Assets	\$ -25,200	\$ -31,501	\$ -21,929
Current Liabilities	\$ 800	\$ 1,970	\$ 0
Net current assets	\$ -26,000	\$ -33,471	\$ -21,929

⁷ 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.

⁸ As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$9,703, and net current assets of -\$26,00, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, as previously illustrated, the petitioner shows a taxable income of -\$23,203, and net current assets of -\$33,471, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, as previously illustrated, the petitioner shows a taxable income of \$15,355, and net current assets of -\$29,929, and has not, therefore, demonstrated the ability to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present, based on either its net income or its net current assets.

On appeal, counsel also cites *Elatos Restaurant Corp. etc. v. Sava*, 632 F. Supp 1049 (S.D.N.Y. 1986). With regard to Denver Tofu, With regard to *Elatos*, the findings in this decision do speak to the proposition that the petitioner can submit further evidence to clarify the financial information found in the petitioner's materials submitted to the record. In *Elatos*, the petitioner had only submitted its corporate income tax return on appeal, as sole evidence of its ability to pay the proffered wage. The income tax return submitted indicated a taxable income of \$5,717, less than half of the proffered wage. The petitioner in *Elatos* argued that legacy INS should have considered depreciation deductions and expenses in calculating the petitioner's taxable income. The court denied the petitioner the use of depreciation expenses in calculating the petitioner's net income and referred to more conclusive evidence such as cash flow data or certified financial statements to clarify any income figures. Such evidence is not part of the petitioner's federal income tax return but rather supplementary financial information. *Elatos* therefore does not stand for the proposition, as counsel appears to assert, that other parts of the petitioner's tax return be given more weight than the petitioner's net income or net current assets.

As stated previously, precedent case law does not support counsel's assertion that the petitioner's cost of labor and materials should be considered in evaluating the petitioner's ability to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). As stated previously, the petitioner's wages paid and cost of materials figures are identified on the first page of the petitioner's income tax return and are included in the calculations of the petitioner's net income. They will not be considered as separate items and given as much weight as the petitioner's net income or net current assets.

On appeal, counsel cites *Matter of Sonogawa*. Counsel cites this case to support her assertion that other parts of the tax return, namely the petitioner's cost of labor and materials identified in the return, could be considered when examining the petitioner's ability to pay the proffered wage, and not merely the petitioner's net income. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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 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.

Counsel does briefly raise the issue of officer compensation in her cover letter that accompanied the petition. It is true that corporations, and sole or majority shareholder of corporation do have the flexibility to allocate the profits of the corporation towards the compensation of its officers. Furthermore, in some circumstances, the compensation of officers may be viewed as an additional source of funds with which to pay the proffered wage. Such circumstances could include the discretionary nature of any compensation, the varying amounts of compensation and the willingness of a majority shareholder to contribute funds from his or her compensation to pay the proffered wage.

In the instant petition, the record reflects one owner/sole shareholder in 2001, and three shareholders in 2002 that respectively own 45 percent, 45 percent, and 10 percent of the petitioner. In tax year 2003, the record reflects a similar breakdown of percentage interest in the petitioner among the three shareholders. The petitioner's tax records in tax year 2001 indicate that the sole officer and shareholder in 2001 received compensation of \$178,000. In tax year 2002, the petitioner's tax return indicates that the three shareholders were compensated \$141,000, \$163,000, and \$69,437 respectively.⁹ In 2003, the petitioner's tax records reflect that the petitioner's three shareholders earned \$253,300, \$267,900, and \$64,450, respectively.

In looking at the totality of the petitioner's circumstances, based on evidence submitted to the record, the petitioner incorporated in 1985 and, as of the 2001 priority year date, had been in business for 16 years. The record reflects the petitioner's employment of 17 employees, and the increasing compensation of its officers in the years in question, namely, 2001 to 2003. The petitioner's gross profits, while not dispositive of the petitioner's ability to pay the proffered wage, were over \$1,400,000 in each year examined, while salaries to employees ranged from \$490,389 to \$265,135. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Thus, the petitioner has established that it has the ability to pay the proffered wage from the 2001 priority date and onward. Therefore, the director's decision shall be withdrawn, and the petition shall be approved.

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 met that burden.

ORDER: The appeal is sustained.

⁹ In 2002, the former sole shareholder had a 45 per cent interest in the petitioner and received \$141,000. In tax year 2003, he received \$252,300.