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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 20 2007
WAC 03 264 55279

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

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, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a computer software development firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing

by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 18, 2001. The proffered wage as stated on the Form ETA 750 is \$100,000 per year.

The Form I-140 petition in this matter was submitted on September 23, 2003. On the petition, the petitioner stated that it was established during 1992 and that it employs four workers. The petition states that the petitioner's gross annual income is \$941,482 but does not state the petitioner's net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary on June 18, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Palo Alto, California.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the petitioner's 2000, 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) unaudited profit and loss statements pertinent to the petitioner's performance during 2002 and the first eight months of 2003, (3) a letter dated December 5, 2005 from the petitioner's owner, (4) statements pertinent to the petitioner's bank account, and (5) statements pertinent to the petitioner's owner's bank and brokerage accounts. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on April 1, 1995, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2000 the petitioner declared ordinary income of \$174,692. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. This office notes, however, that because the priority date of the instant visa petition is July 18, 2001, evidence pertinent to its finances during previous years is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date.

During 2001 the petitioner declared ordinary income of \$90,411. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared a loss of \$11,490 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner declared ordinary income of \$21,476. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During 2004 the petitioner declared a loss of \$335,185 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's owner's December 5, 2005 letter makes various assertions and observations. That letter (1) describes the petitioner's products, its business, two positions the petitioner is attempting to fill, and the petitioner's contacts, (2) states that the industry suffered during 2003 and 2004, but cites other companies' gradually increasing stock prices since 2004 as evidence that the market is confident that the industry will remain fiscally healthy, (3) states that the petitioner's self-developed software is an asset not shown on its financial statements, (4) states that the company is able to borrow as necessary, (5) states that the petitioner incurred expenses for outside programming services during each of the salient years, which funds could have been used to pay the proffered wage, (6) noted the amount in the petitioner's bank accounts, and (7) stated that he will support the petitioner with his personal funds as necessary.

The director denied the petition on November 4, 2005.

On appeal, counsel asserted (1) that the amount of the proffered wage due during 2001 should be prorated to reflect the portion of the year remaining on the priority date, (2) that the petitioner's depreciation deductions should be considered in determining its ability to pay the proffered wage, (3) that the petitioner's total salary and wage expense is an index of its ability to pay the proffered wage, (4) that the petitioner is currently recruiting for two positions and that this is an indication that it will continue in business, (5) that the petitioner's business suffered from a downturn occasioned by the events of September 11, 2001, but has released new products expected to dramatically increase its revenues. In regard to that final argument counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petition may be approved notwithstanding that the petitioner suffered losses or low profits during salient years.

Further, counsel cites *Ranchito Coletero*, 2002-INA-105 (Jan. 8, 200-4) for the proposition that the income and assets of the petitioner's owner should be considered and notes that 8 C.F.R. § 204.5(g)(2) permits consideration of other evidence, in addition to copies of annual reports, federal tax returns, or audited financial statements, in appropriate cases.

Counsel's reliance on unaudited² financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

² In addition to the lack of an accountant's report, which must necessarily accompany audited financial statements whenever they are presented for any purpose; those reports state that they were produced pursuant to cash convention accounting. Because cash convention reporting is not in accordance with generally accepted accounting principles promulgated by the American Institute of Certified Public Accountants, the preparation of those reports pursuant to cash basis demonstrates that they were not produced pursuant to an audit.

Counsel's reliance on the petitioner's ability to borrow is similarly misplaced. An indication of available credit is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel cites *Ranchito Coletero*, 2002-INA-105 (Jan. 8, 200-4) for the proposition that the income and assets of the petitioner's owners should be considered. Counsel's argument pertinent to [REDACTED], is unconvincing. The petitioner in that case was a sole proprietorship. The owners of sole proprietorships are not merely permitted but obliged to pay the debts and obligations of their companies out of their own income and assets.

The instant petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, its owners are not obliged to satisfy the company's debts and obligations out of their own funds. The assets of its shareholders or of other enterprises or corporations, therefore, cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, including the balances in his bank and investment accounts, shall not be further considered.

Counsel's reliance on the petitioner's own bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.³

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁴ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner's total salary and wage expense is not an index of its ability to pay additional wages. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is

case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁴ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

⁵ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

Counsel asserts that the petitioner's losses and low profits are the result of the general decline in the information technology field occasioned by the events of September 11, 2001. That information technology firms suffered in that era is well known, but counsel has presented no convincing evidence that the bursting of the dotcom bubble was due to the tragic events of September 11, 2001, rather than market forces. As such, counsel has not demonstrated that the petitioner's losses and low profits were uncharacteristic or are unlikely to recur.

For that reason counsel's citation of *Matter of Sonogawa*, 12 I&N Dec. 612, is unconvincing. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business. This was an uncharacteristic expense that was unlikely to recur.

In *Sonogawa*, 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 lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

In the instant case, however, no unusual circumstances have been shown to exist to parallel those in *Sonogawa*, nor has it been established that 2001, 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner. The record does not demonstrate that the petitioner's new software releases will be profitable. That the petitioner is recruiting for two positions and that other companies' stock values are climbing are not convincing support for the proposition that the petitioner will resume profitable operations. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. This office will further consider the opinion in *Sonogawa* below, however, in a different context.

The petitioner's owner is very possibly correct in stating that the petitioner owns software that is either not reflected as an asset or is carried at a book value far lower than its actual value. The petitioner's owner's statement, however, is insufficient to establish that assertion as fact such that it sustains the petitioner's burden of

proof in this matter. Further, even if the petitioner's owner's assertion were sufficiently demonstrated, the value of self-developed software would not typically be a current asset. Non-current assets, as further explained below, do not represent liquid funds available to pay additional wages.

The petitioner's tax returns show that it spent \$784,464, \$257,563, \$152,841, and \$172,982 during 2001, 2002, 2003, and 2004, respectively. During 2001 that expense was listed as "Outside Services." During 2002, 2003, and 2004 that expense was listed as "Contract Programming." The petitioner's owner states that each of those amounts was paid for non-employees to develop software for the petitioner, and that hiring the beneficiary would have obviated those amounts, thus freeing additional funds with which the petitioner could have paid the proffered wage.

Given that the petitioner is a software developer, this office finds credible the assertion that an expense of that size, so labeled, was incurred acquiring non-employee software development services, at least in large part. The petitioner, however, provided no evidence to demonstrate how much of those amounts were paid for duties the beneficiary could have performed, or what portion of those fees hiring the beneficiary would have obviated. Under these circumstances, this office cannot calculate what portion of those amounts was available to pay the wage proffered to the beneficiary. Those amounts shall be considered, though non-numerically, below.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the

beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). 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.

The proffered wage is \$100,000 per year. The priority date is July 18, 2001.

During 2001 the petitioner declared ordinary income of \$90,411. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner's ordinary income and net current assets are insufficient to demonstrate the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner's ordinary income and net current assets are insufficient to demonstrate the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$21,476. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner's ordinary income and net current assets are insufficient to demonstrate the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

portion of the proffered wage out of its net current assets during that year. The petitioner's ordinary income and net current assets are insufficient to demonstrate the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on September 23, 2003. On that date the petitioner's 2005 tax return was unavailable. On August 19, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

The petitioner's ordinary income and net current assets were insufficient, in themselves, to demonstrate that the petitioner was able to pay the proffered wage during 2001, 2002, 2003, and 2004. In this case, however, this office is convinced that other factors must be considered.

The petitioner has been in business since 1992. Its gross receipts have ranged from a low of \$317,258 during 2004 to a high of \$2,460,061 during 2001. Although this office is unable to determine with mathematical certainty what portion of the petitioner's contract programmer expenses hiring the beneficiary would have obviated, it appears that the beneficiary's hours would have replaced other technicians' hours in an amount that would have paid a large part of, and possibly all of, the proffered wage.

This office finds, based on the totality of circumstances test enunciated in *Sonegawa*, that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.