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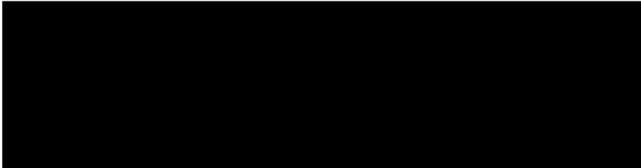
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U.S. Citizenship  
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Services

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**DEC 04 2007**

FILE: [Redacted]  
EAC 06 019 50017

Office: VERMONT SERVICE CENTER

Date:

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.

*Kevin S. Poulos for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The nature of the petitioner's business is residential remodeling. It seeks to employ the beneficiary permanently in the United States as a construction supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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. The director denied the petition accordingly.

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

As set forth in the director's denial dated May 3, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 13, 2001.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$16.70 per hour (\$34,736.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as a building contractor..

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<sup>1</sup> It has been approximately six years since the Alien Employment Application has been accepted and the

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

Relevant evidence in the record includes copies of the following documents: a cover letter from counsel dated October 19, 2005; letters from petitioner dated July 5, 2005 and March 1, 2006; the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1065 tax returns for 2001, 2002, 2003 and 2004; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a domestic general partnership. On the petition, the petitioner claimed to have been established in 1999 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner since September 2000.

A general partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The record of proceeding establishes that the petitioner is a general partnership with four general partners. However, the record contains no information regarding the assets or liabilities of the general partners. As such, the petitioner has not established that the assets of the general partners may be utilized to pay the proffered wage.

On appeal, counsel asserts that the director erred as a matter of law. Counsel contends that the director failed to consider the totality of the circumstances in the case and failed to consider the petitioner's reasonable expectations of increased business as a result of expenses and the ability to maintain profitability. Counsel cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Further, on appeal, the petitioner asserts that the director made errors of fact. According to counsel the director failed to consider in his determination the profit drawn by the partners of the petitioner, failed to consider the year 2002 extraordinary expenses on material that "created future profit," failed to consider

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proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid 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."

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

“amounts paid to outside sources when computing the ability to pay wages” and failed to consider the “upward trend of consistent and increased revenue in subsequent years.”

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes copies of the following documents: a letter from the petitioner dated May 5, 2006, an affidavit from the petitioner with “sample contracting agreements,” a 1099-MISC issued to the beneficiary by another employer and the beneficiary’s personal federal tax return for 2001; and, a summary chart showing the petitioner’s gross receipts and expenses for tax years 2001, 2002, 2003 and 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 (BIA 1967).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

The director requested the beneficiary’s W-2 statements but the petitioner stated that it had not issued any W-2 statements to the beneficiary. No proof of compensation paid to the beneficiary by the petitioner was submitted by the petitioner in this matter. Therefore, the petitioner must establish that it can pay the entire proffered wage to the beneficiary.

According to the beneficiary’s personal federal tax return for 2001 submitted into evidence, the beneficiary was self employed in 2001. According to the petitioner’s undated letter submitted on appeal, the beneficiary worked as an independent contractor for the petitioner from September 2000 to April 2001. Ms. [REDACTED] stated that “we didn’t pay him [the beneficiary] after mid-April and we issued no W2 forms.” However there is no evidence such as the petitioner’s 1099-MISC statements, pay records, cancelled checks, or business ledger statements to show the amount of this compensation.

According to the labor certification the beneficiary commenced working for the petitioner in September 2000, and according to the CIS Form G-325 in the record of proceeding, the beneficiary ceased working for the petitioner in April 2001, and thereafter worked in “various jobs” from May 2001 to the present time (i.e. January 24, 2006.) According to counsel’s exhibit schedule the compensation received in 2001 was from [REDACTED] as evidenced by a 1099-MISC. That amount of compensation, \$2,582.15, is not found on the beneficiary’s personal 2001 tax return as a separate item and it is not clear if this amount was reported on that return.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

For a partnership, where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 1 of the Analysis of Net Income (Loss) of schedule K.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1065 stated net income (Line 22) of \$14,662.00.
- In 2002, the Form 1065 stated net income of \$16,058.00.
- In 2003, the Form 1065 stated net income of \$40,751.00.
- In 2004, the Form 1065 stated net income of \$34,014.00.

Since the proffered wage is \$34,736.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002 and 2004. In tax year 2003 the petitioner had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during the 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.<sup>3</sup> A partnership's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand.

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

Its year-end current liabilities are shown on lines 15 through 17. If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001, 2002, 2003, and 2004 were <\$82,473.00>, <\$27,849.00>, <\$86,983.00>, and <\$44,277.00> respectively.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets, except for year 2003.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>4</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

As a preface to the following discussion, counsel has made various contentions and has cited cases in support of her contentions but only some of the cases cited are precedent that are binding upon CIS and the AAO. Counsel has cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985).

Counsel refers to unpublished decisions in support of her contentions but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).<sup>5</sup>

The petitioner contends that with the permanent employment of the beneficiary as construction supervisor or as a business partner (which is beyond the scope of the offered job), its business income that will increase. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a construction supervisor will significantly increase the petitioner's profits since the beneficiary had been in the petitioner's employ from September 2000 to April 2001 without any corresponding increase in profits.

Further, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently

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<sup>4</sup> 8 C.F.R. § 204.5(g)(2).

<sup>5</sup> We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

stated in her letter dated March 1, 2006 that the petitioner's partners wanted to "step down" from their present full time supervising duties, hire the beneficiary or bring him into the business as a partner, and allow them to supervise part-time instead.

Counsel advised that the beneficiary will replace the petitioner's partners in their present duties. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of business partner involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, and the duties of partner and explained how those duties relate to the duties of the proffered position. If that partner performed other kinds of work, then the beneficiary could not have replaced him or her.

According to counsel the director failed to consider in his determination the profit drawn by the partners of the petitioner. According to the summary chart submitted by counsel on appeal, the general partners' draws were \$111,068.00 in 2001, \$31,909.00 in 2002, \$135,312.00 in 2003 and \$23,500.00 in 2004. Counsel asserts that these draws are evidence of the petitioner's ability to pay the proffered wage.

Counsel has not demonstrated that the compensation of the partners is discretionary. A review of the record of proceeding demonstrates the partners have not volunteered to reduce their "draws," that is their earnings from the business, to pay the proffered wage. Counsel's assertion is unsupported by the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Notwithstanding the above, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. There is no evidence in the record of the partners' personal expenses and liabilities. However, assuming for the sake of argument that the partners' draws taken in the four relevant years could have been utilized to pay the proffered wage, the AAO cannot determine if the partners could have in fact paid the proffered wage and also paid their personal expenses.

Counsel states that the director failed to consider the year's 2002 extraordinary expenses on material that "created future profit." These "extraordinary expenses" were described by counsel as "unusually large materials expense in preparing for increased business in 2003." A reasonable interpretation of counsel's contention is that a materials inventory was "built up" in one year (2002) to be utilized in the business in the succeeding year (2003). By definition this expense item noted is a long-term asset in inventory to be utilized in a period of time more than one year.

As already stated, "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. As already discussed above, net current assets after including liabilities were less than the proffered wage in every year for which tax returns were submitted. Further it is duplicative of the petitioner's finances to combine net current assets with the net income and loss as stated above.

Further, the value of inventories owned by the petitioner and their ability available to produce future income cannot be evidence of the ability to pay. Counsel maintains that the inventories' potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. Insofar as the revenue generated is expressed ultimately on the tax returns as net income, counsel is attempting to duplicate the petitioner's income producing potential without considering the offsetting cost of operations. 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.

Counsel states that the director failed to consider "amounts paid to outside sources when computing the ability to pay wages." According to the summary submitted by counsel into evidence on appeal, the petitioner expended the following amounts on "outside help" (which the AAO assumes is also named in the record as "outside sources") \$25,215.00, \$40,312.00, year 2003 was reported as "not itemized" and \$382,418.00 in the years 2001, 2002, 2003 and 2004 respectively.

The record does not, however, name these outside sources, state their compensation, verify their full-time employment, or provide evidence that the petitioner would replace them with the beneficiary. Compensation already paid to others is not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker or independent contractor who performed the duties of the proffered position. No Form MISC-1099s were submitted. If that outside source performed other kinds of work, then the beneficiary could not have replaced him or her. This hypothesis cannot be concluded to outweigh the evidence presented in the partnership tax returns.

Counsel also states that "proportional wage calculations are proportional for 2001" (although no wage or compensation evidence was provided by the petitioner). By implication, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date, that is April 13, 2001. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual 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), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel states that the director failed to consider the "upward trend of consistent and increased revenue in subsequent years" and cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of her contention. *Matter of Sonogawa* 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 asserts that the petitioner's gross receipts have grown in each year starting in 2001 through 2004 and that the gross receipts are evidence of the ability to pay the proffered wage. As already stated reliance on the petitioner's gross sales is misplaced. 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). Profits stated for the partnership for the four years for which tax returns were available were modest and less than the proffered wage of \$34,736.00 per year except for one year. In 2001 net income was \$14,662.00, in 2002, net income was \$16,058.00, and in 2004 the petitioner stated net income of \$34,014.00. Only in 2003 was the petitioner's net income of \$40,751.00 enough to pay the proffered wage. Despite counsel's assertion to the contrary, the profit trend for petitioner was essentially flat and minimal relative to the petitioner's gross receipts.<sup>6</sup>

Counsel and the petitioner state that material costs, "a one-time bulk expense," in 2001 was an unusual occurrence that distorts the petitioner's profitability picture. However, the AAO notes that on Attachment "E" to counsel's brief, material costs were \$449,248.00, \$858,165.00, \$720,391.00 and \$880,578.00 in years 2001, 2002, 2003 and 2004. Based on those figures the material costs expenses expended in 2001 for 2002 and expended in every year thereafter through 2004 were in fact ordinary amounts, not extraordinary amounts. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002 2003 or 2004 were uncharacteristically unprofitable years for the petitioner.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>6</sup> Also the petitioner's gross receipts decreased from 2002 to 2003.