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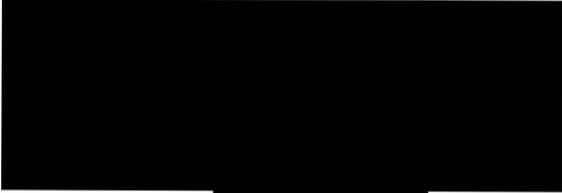
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

BY

PUBLIC COPY



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER  
WAC 04 223 53324

Date: JAN 08 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

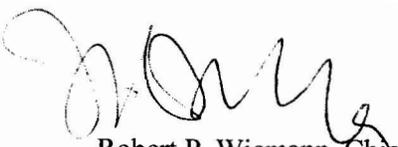
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a small animal hospital. It seeks to employ the beneficiary permanently in the United States as a veterinarian. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel states that the petitioner has sufficient financial resources to pay the difference between the beneficiary's actual wages and the proffered wage. Counsel submits additional documentation.

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.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 2001. The proffered wage as stated on the Form ETA 750 is an hourly salary of \$40, or an annual salary of \$83,200.<sup>1</sup> On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2000.

On the petition, the petitioner claimed to have been established in 1980, to have seven employees, a gross annual income of \$559,345.42, and a net annual income of \$104,357. With the petition, the petitioner

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<sup>1</sup> The AAO calculates this figure by multiplying the \$40 hourly rate by 2080 annual hours of work. 2080 hours are calculated by multiplying 40 hours of weekly work by 52 weeks.

submitted evidence of the beneficiary's academic credentials and licensure as a veterinarian from the state of California. The petitioner submitted a letter of support that stated the beneficiary worked as an associate veterinarian, and was employed at a salary of \$40 an hour, or \$6,400 a month.<sup>2</sup> The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001, 2002, and 2003.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 10, 2005, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage as of March 23, 2001 to the present time. The director requested that the petitioner submit all schedules and attachments with the submitted tax returns.

In response, counsel submitted IRS Forms 1120S, the petitioner's corporate tax returns for the years 2001, 2002 and 2003, along with a profit and loss statement for fiscal year 2004. The petitioner also submitted a Form I-797A that established that Citizenship and Immigration Services (CIS) had approved the petitioner's H-1B1 petition for the beneficiary with validity from May 16, 2003 to May 16, 2006. The petitioner's federal tax returns indicated ordinary income of \$2,803 in tax year 2001, \$16,867 in tax year 2002, and \$18,800 in tax year 2003.

On April 29, 2005, the director denied the petition. In his decision, the director stated that the petitioner's 2001 tax return showed gross receipts or sales of \$507,707, compensation of officers of \$80,750, salaries and wages of \$161,955, total deduction so f \$504,904, and ordinary income of \$2,803. The director noted that the petitioner had net current assets of -\$9,813. Based on these figures, the director stated that the petitioner did not have sufficient income to pay the proffered wage of \$83,200.

With regard to tax year 2002, the director noted that the petitioner had gross receipts or sales of \$534,707, no officer compensation, salaries and wages of \$217,145, total deductions of \$517,219, and ordinary income of \$16,867. The director noted that the petitioner's net current assets were \$3,460, and then stated that the petitioner did not have sufficient income to pay the proffered wage.

With regard to tax year 2003, the director noted that the petitioner had gross receipts or sales of \$559,345, officer compensation of \$92,000, salaries and wages of \$142,300, total deductions of \$540,545, ordinary income of \$18,800. The director then noted that the petitioner had net current assets of \$16,883 and stated that the petitioner did not have sufficient income to pay the proffered wage. With regard to tax year 2004, the director noted that the petitioner's profit and loss statement indicates a net income of -\$9,946 for the year.

On appeal, counsel states that the totality of the petitioner's circumstances established that it has the ability to pay the proffered wage. Counsel notes that additional evidence of the petitioner's ability to pay the wage is relevant to establishing this ability, and submits further documentation.

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<sup>2</sup> If the petitioner's figure of a monthly salary of \$6,400 is multiplied by twelve months, the resulting salary is \$76,800. The AAO, however, considers its calculations of the proffered wage as the more precise calculation.

Documentation submitted to the record on appeal include the beneficiary's W-2 forms that indicate the petitioner paid the beneficiary \$66,796.50 in tax year 2001, \$70,364.60 in tax year 2002, \$51,952 in tax year 2003, and \$41,210 in tax year 2004. Counsel also submits numerous documentation with regard to the assets of the petitioner's two principal shareholders, [REDACTED] and [REDACTED] to include their IRS Forms 1040 for tax years 2001 to 2003, property tax bills for three properties owned by the two shareholders dated 2005; bank account statements from Citibank dated April 18, 2005 for the two shareholders, and an [REDACTED] Investments Investment Report for [REDACTED] that indicates a value of \$392,381.61, as of April 2005.

Counsel also submits a letter from [REDACTED], CPA, San Francisco, California. In his letter, Mr. [REDACTED] states that he has been the petitioner's accountant for over 13 years. Mr. [REDACTED] points out the petitioner's stable and consistent gross income for the tax years 2001, 2002, and 2003, and also the primary shareholder's sole discretion over disbursement over how much he pays himself. Mr. [REDACTED] that 2001, Mr. [REDACTED] paid himself \$80,700; in 2002, \$52,000; in 2003, \$92,000; and in [REDACTED] paid himself \$155,000.<sup>3</sup> Mr. [REDACTED] states that the principal shareholder could have reduced his salary in 2004 by over \$60,000 and still paid the proffered wage. Based on such discretionary wages, Mr. [REDACTED] states that the petitioner has discretionary spending capacity to pay the offered salary. Mr. [REDACTED] states that the petitioner's owner and primary shareholder has additional sources of income, excluding his compensation by the petitioner, that allow him to inject additional funds into the petitioner, if need be, and also to allow the petitioner's owner to draw down less of the petitioner's funds and leave funds available to pay the proffered salary.

On appeal, counsel notes that three alternative tests, as outlined in a memo by William Yates in May 2004<sup>4</sup> are utilized to demonstrate the petitioner's ability to pay the proffered wage, namely, the petitioner's net income, its net current assets, or its payment to the beneficiary of the actual wage. Counsel also notes that these three alternatives can be mixed and matched for different years in question to establish the petitioner's ability to pay the proffered wage, such as by combining the actual wages with the petitioner's net income or net current assets.

Counsel then states that by combining the beneficiary's actual wages with either the petitioner's net income or net current assets, the petitioner easily demonstrates its ability to pay the proffered wage in tax year 2002 and 2003. Counsel states that in 2002, the petitioner paid the beneficiary \$70,364, leaving a difference of \$12,835.40 between the beneficiary's actual wages and the proffered wage of \$82,300. Counsel then notes that in tax year 2002, the petitioner had ordinary income of \$16,867 and net current assets of \$3,460. Counsel states that the petitioner could pay the difference between the beneficiary's actual wages and the proffered wage either through its ordinary income or a combination of its ordinary income and net current assets.<sup>5</sup>

<sup>3</sup> This figure is taken out of the petitioner's profit and loss statement for tax year 2004. Neither the petitioner's 2004 federal tax return nor the petitioner's owner's individual tax return is found in the record.

<sup>4</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

<sup>5</sup> Counsel incorrectly combines the petitioner's net income and net current assets in her examination of the petitioner's ability to pay the difference between the beneficiary's wages and the proffered wage. The AAO

With regard to tax year 2003, counsel states that the difference between the actual wages paid to the beneficiary, namely, \$51,952.80, and the proffered wage is \$31,247.20. Counsel states that during 2003, the petitioner had ordinary income of \$18,800 and net current assets of \$16,883. Counsel states that by combined the petitioner's ordinary income and net current assets for 2003, the petitioner has sufficient funds to pay the difference between the beneficiary's actual wages and the proffered wage.<sup>6</sup> Counsel does not examine the petitioner's ability to pay the difference between the beneficiary's actual wages of \$66,796 and the proffered wage in tax year 2001.

Counsel also notes that the AAO and other courts have regularly looked beyond the basic tests set forth in the Yates ATP memo, and states that AAO should consider the totality of the petitioner's circumstances in the instant petition. Counsel cites *Ohsawa America* 1988-INA 240 (BALCA 1988) and states that in this decision by the Department of Labor's Board of Alien Labor Certification Appeals the \$4 million personal assets of a S corporation owner were considered and were held to be sufficient in determining a petitioner's ability to pay the wage. Counsel notes that the petitioner's sole owner, [REDACTED] has substantial assets to document his ability to pay the proffered wage. Counsel states that Mr. [REDACTED] individual tax returns show taxable income of \$272,106, \$296,517, and \$256,086 for the tax years 2001 to 2003. Counsel also notes that Mr. [REDACTED] currently has a trust fund with Fidelity Investments, credit lines totaling over \$300,000, as well as various properties valued at nearly \$1.5 million. Counsel contends that the analysis of the shareholder's assets is especially pertinent in the petitioner's case, in which there is one owner and the corporation is more similar to a sole proprietorship than a S corporation. Counsel states that in a single shareholder S corporation, such as the petitioner, Mr. [REDACTED] has the ability to increase or decrease the petitioner's net income by paying himself. When Mr. [REDACTED] pays himself a higher income, which reduces the petitioner's net income, he realizes an overall tax savings. Counsel asserts that although the petitioner may not indicate a net income to cover the proffered wage of the beneficiary, the petitioner in fact is quite liquid and viable for purposes of establishing its ability to pay. Counsel states that the petitioner has been in business for 13 years, and has consistently had income in excess of half a million dollars.

It is noted that although counsel refers to the petitioner's being in business for 13 years, the record is confused with regard to the petitioner's business existence. The instant I-140 indicates the petitioner was established in 1980, while the petitioner's tax returns indicate it was incorporated in the year 2000. While the petitioner may have existed prior to 2000 in some other business structure, such as a sole proprietorship, or partnership, the record does not clarify or support counsel's assertion. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." If counsel or the petitioner wish to base any consideration of the petitioner's ability to pay the proffered wage on the petitioner's longevity, the petitioner's longevity has to be more fully established.

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will examine the use of the petitioner's net income and net current assets more fully further in these proceedings.

<sup>6</sup> Again, counsel is incorrect in combining both the petitioner's net income and net current assets in her calculations.

Counsel states that a Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO, citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988). Counsel does not state how DOL precedent is binding in these proceedings. 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, BALCA 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).

With regard to counsel's assertion that the petitioner's net income and net current assets can be combined to make up the difference between the beneficiary's wages in 2003 and the proffered wage of \$82,3000, this approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

The petitioner's accountant and counsel assert that Mr. Wong is the sole owner of the petitioner, however they offer no further substantiation of this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). With regard to shareholders, the record reflects that there are two shareholders, Mr. [REDACTED] and his wife, [REDACTED]. As established by the petitioner's federal tax returns, each shareholder has a 50 per cent share interest in the petitioner. The joint tax returns for the petitioner's owner and his wife do establish that the officer compensation identified in the petitioner's tax returns is solely provided to Mr. [REDACTED].

It is further noted that, contrary to the assertions of counsel, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The AAO will further discuss in these proceedings the petitioner's business structure as a S Corporation providing professional services and any consideration provided to the tax implications of such a business structure and the petitioner's ability to pay the proffered wage.

It is noted that the petitioner submitted documentation as stipulated in with regard to its financial ability, namely its federal corporate tax returns for tax years 2001 to 2003. In addition, it submitted a profit and loss statement for tax year 2004 in lieu of its 2004 Form 1120S. Profit and Loss Statements are not usually accorded any weight in these proceedings, as they are not audited and represent the representations of management. It is acknowledged that the director denied the petition on April 29, 2005, only two weeks after the petitioner would have submitted its 2004 federal tax return, and therefore the petitioner's federal income

tax return may not have been available for submission to the director on appeal. Based on these considerations, the AAO will only consider the petitioner's ability to pay the proffered wage during the tax years 2001 to 2003.

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 petitioner submitted W-2 salary statements for the beneficiary for the years 2001 to 2004, that established the petitioner paid the beneficiary \$66,796.50 in tax year 2001, \$70,364.60 in tax year 2002, \$51,952 in tax year 2003, and \$41,210 in tax year 2004.<sup>7</sup> The beneficiary's wages for these years is not equal to or greater than the proffered wage of \$83,200. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. However, based on the documentation of the beneficiary's actual wages, the petitioner has the obligation to only establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage. During tax years 2001 to 2003, the difference between the beneficiary's actual wages and the proffered wage were \$16,403.50 in 2001, \$12,835.40 in 2002, and \$31,248 in 2003.

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). 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 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

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<sup>7</sup> As stated previously, the AAO will only consider the petitioner's ability to pay the proffered wage as of the 2001 priority date to tax year 2003. Therefore the beneficiary's wages in tax year 2004, while established in the record, are not dispositive in these proceedings.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. Based on the petitioner's tax returns from tax years 2001 to 2003, the petitioner had net income of \$2,803, in 2001, \$16,867 in 2002, and \$18,800 in 2003. Based on its net income in tax year 2002, the petitioner had sufficient funds to pay the difference between the beneficiary's actual wages that year and the proffered wage, namely, \$12,835.40. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner did not have sufficient net income in tax year 2001 or 2003 to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$16,403.50 in 2001, and \$31,248 in 2003. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the 2001 priority date to the present based on its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate 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. 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. 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 petitioner submitted the following information for tax years 2001 and 2003:

	2001	2003
Ordinary Income	\$ 2,803	\$ 18,800
Current Assets	\$ 1,485	\$ 26,423
Current Liabilities	\$ 11,299	\$ 9,540
Net current assets	\$ -9,814	\$ 14,883

These figures fail to establish the ability of the petitioner to pay the difference between the beneficiary's actual wages and the proffered wage based on the petitioner's net current assets in tax years 2001 and 2003. In 2001, the petitioner shows a net income of \$2,803, and net current assets of -\$9,814, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage, namely, \$16,403.50. In 2003, the petitioner shows a net income of \$18,800, and net current assets of \$14,883. As stated previously, the petitioner's net income and net current assets cannot be combined to establish the petitioner's ability to pay the proffered wage. In tax year 2003, the petitioner cannot establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage, namely \$31,248, based either

on its net income or net current assets. Therefore, although the petitioner established its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2002, it has not established its ability to pay the difference in tax years 2001 and 2003.

As noted previously, the assets of the shareholders are not viewed as corporate assets. On appeal, counsel asks CIS to examine the totality of the petitioner's circumstances. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions in which the totality of the petitioner's circumstances are considered. The decision describes a petition filed during an uncharacteristically unprofitable or difficult year within 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. The instant petitioner's tax returns indicate profitable years for the petitioner in 2001, 2002 and 2003.

However, in examining the totality of the petitioner's circumstances, it is noted that the petitioner has a sole owner/officer.<sup>8</sup> The compensation of sole corporate officers may be viewed as discretionary expense, as opposed to wages, which are not discretionary. As such, officers' compensation can be viewed at times as a source of additional funds with which to pay the proffered wage.

To determine whether or not an entity's officer compensation would have been available to the proffered wage, CIS examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officers compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more than the amount of the proffered wage. In addition, CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner.

In examining these issues, the AAO finds that the officer receiving compensation in the instant petition is the only owner/stockholder receiving compensation, and that his compensation varies between \$80,750 in 2001 and \$92,000 in 2003.<sup>9</sup> The petitioner's tax return indicates that these amounts of officer compensation are

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<sup>8</sup> While, as previously stated, the petitioner's owner's wife is listed as a director, and is a 50 per cent shareholder, based on the petitioner's tax returns, she does not receive officer compensation. Based on the petitioner's owner's joint tax returns, he received the total officer compensation in tax years 2001 and 2003.

<sup>9</sup> The petitioner did not identify any officer compensation in tax year 2002, the year in which the petitioner established its ability to pay the difference between the beneficiary's actual wages and the proffered wage,

flexible, and appear to be discretionary sums. The AAO also notes that the money needed to pay the difference between the beneficiary's actual wages and the proffered wage is \$16,403.50 in tax year 2001 and \$31,248 in tax year 2003. It is further noted that in every year since the 2001 priority year, the petitioner's wages and salaries paid to other employees have increased, while the petitioner's gross receipts have always been over \$500,000 annually. On appeal, the petitioner submits the letter from Mr. [REDACTED] the petitioner's accountant. As the owner's accountant, Mr. [REDACTED] letter reflects the petitioner's owner's intent to forego compensation to pay the difference between the beneficiary's actual wages and the proffered wage. Further more the record of proceeding reflects that the petitioner's owner could forego a portion of his compensation based on his Forms 1040s and his personal assets.

The AAO finds sufficient evidence in the record, that the petitioner, based on the varying compensation of its officer, and the nature of its business operations has the ability to pay the proffered wage as of the 2001 priority date and through tax year 2003. The totality of the circumstances supports the fact that the petitioner is a viable, profitable enterprise. Thus the petitioner has established that it has the ability to pay the proffered wage as of the 2001 priority date and to the present.

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. The petition is approved.

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based on its net income. The AAO therefore will not examine the issue of officer compensation in 2002.