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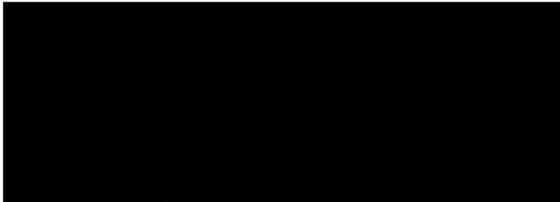
U.S. Department of Homeland Security
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Washington, DC 20529



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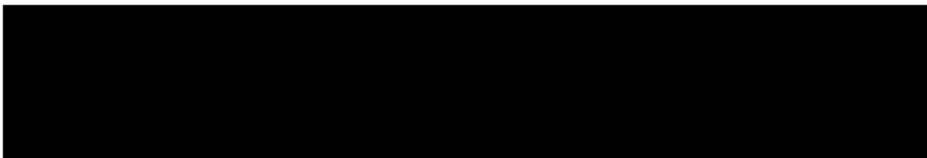
Office: TEXAS SERVICE CENTER Date: APR 07 2008

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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 the operation of an intermediate facility for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a teacher. 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 August 21, 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.

Section 203(b)(3)(A)(ii) of 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.

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 August 15, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$30.92 per hour (\$64,313.60 per year).

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.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from petitioner dated March 24, 2006; letters from counsel dated August 9, 2006, and August 12, 2006; unaudited financial statements³ for the petitioner for the years ending December 31, 2001, 2002 and 2003; correspondence from the Employment Development Department, State of California and the U.S. Department of Labor, Employment and Training Administration; and the petitioner's U.S. Internal Revenue Service Form 1120S tax return for 2004.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1992⁴ and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net income and gross annual income stated on the petition were \$54,349.00 and \$744,667.00 respectively. On the Form ETA 750, signed by the beneficiary on August 2, 2002, the beneficiary did claim to have worked for the petitioner as a teacher from January 2001 to the date she signed the Form ETA 750B.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the 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."

² 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).

³ 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁴ According to the petitioner's tax returns, the petitioner was incorporated on February 10, 1998.

As a preface to the following discussion, counsel has requested that the priority date of the labor certification be amended. The AAO has no jurisdictional authority to review the determination of the priority date. This matter will not be discussed further.

The director by a request for evidence dated May 23, 2006, requested the petitioner's tax returns for 2002 and 2003. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. §§ 103.2(b)(14). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes the following documents: the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003, 2004 and 2005; two affidavit statements dated October 2, 2006, by the owners of the petitioner; a survey by [REDACTED] dated October 2, 2006 entitled "Four Year Comparative Income Statement"⁵ concerning the petitioner; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the second and third quarters of 2002, for 2003, for 2004, and for the second, third and fourth quarters of 2005, that were accepted by the State of California; and the beneficiary's wage and tax statements for 2002, 2003, 2004 and 2005.

On appeal, the petitioner asserts that that the petitioner is a "pass-through" entity to its two shareholders who have discretionary funds available to pay the expenses of the corporation. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988)⁶ in support of this assertion.

Counsel asserts that the petitioner's positive net incomes, "pledged funds,"⁷ capital stock, and retained earnings are evidence of the ability to pay the proffered wage.

Counsel cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Counsel contends that the fact that the petitioner has been in business since 1992, had increased gross incomes and positive net incomes from 2002 to 2005, and according to counsel in the totality of the circumstances of the case and evidence submitted, is a viable and profitable business are all evidence of the petitioner's ability to pay the proffered wage.

⁵ As already stated, unaudited financial records or in this case a survey, are not acceptable evidence under the regulation at 8 C.F.R. § 204.5(g)(2).

⁶ The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages. A pledge does not create a corresponding debt and liability, as does the line of credit.

⁷ Presumably the pledged funds are the discretionary funds mentioned by the owners of the petitioner in two affidavits in the record.

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.

Counsel submitted W-2 Wage and Tax statements from the petitioner to the beneficiary for years 2002, 2003, 2004 and 2005⁸ in the amounts of \$14,120.00, \$15,687.40, \$16,056.62 and \$20,400.00. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$64,313.60 per year, the petitioner must establish that it can pay the beneficiary the differences between wages actually paid and the proffered wage for each year which for 2002 is \$50,193.60, for 2003 is \$48,626.20, and for 2004 is \$48,256.98.

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 that 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. The petitioner's Form 1120S⁹ tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

⁸ In 2005, the petitioner had sufficient net income to pay the proffered wage without references to wages paid to the beneficiary.

⁹ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the

- In 2002¹⁰ the Form 1120S stated net income (line 21) of \$8,388.00.
- In 2003 the Form 1120S stated net income of \$40,850.00.
- In 2004 the Form 1120S stated net income of \$54,349.00.
- In 2005 the Form 1120S stated net income of \$79,818.00.¹¹

Since the proffered wage is \$64,313.60 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2002, 2003 and 2004. In 2005 the petitioner did have 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.¹² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation'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 were as follows: during 2002 (none reported); during 2003, \$4,661.00.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage of \$64,313.60 per year in 2002,¹³ 2003 and 2004. However, in 2004, the petitioner had sufficient net income to pay the proffered wage with reference to the wage paid to the beneficiary in that year of \$48,256.98.

Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

¹⁰ The 2002 return was incomplete as submitted. No schedule L was submitted.

¹¹ Because of two small deductions, the petitioner reported slightly less income on Schedule K, Line 17(e), \$78,552.00.

¹² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹³ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

However, 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 wages paid to the beneficiary, or its net income or net current assets in years 2002 and 2003.

Counsel asserts in his 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,¹⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As already stated, on appeal, the petitioner asserts that that the petitioner is a "pass-through" entity to its two shareholders who have discretionary funds available to pay the expenses of the corporation. Two affidavits were submitted from [REDACTED] and [REDACTED] who are the owners and sole shareholders of the petitioner. In summary both shareholders stated that the compensation they receive from the business is discretionary and relates to the profitability of the company in each operating year.

Further, the shareholders stated that each of them have "set aside" an amount each year as "discretionary" funds from the salaries they receive. These funds were utilized to pay the petitioner's current liabilities, expenses and wages if there were not enough funds to pay for yearly expenses. According to the shareholders these "set aside" funds were not loans, current liabilities or notes payable but cash investments to support the petitioner's operations.¹⁵ [REDACTED] and [REDACTED] are the owners and sole shareholders of the petitioner.

The compensation of the officers of the petitioner as derived from the tax returns (line 7) as submitted were \$0.00 in 2002, \$0.00 in 2003, \$0.00 in 2004 and \$0.00 in 2005.

As stated on appeal the petitioner submitted California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the second and third quarters of 2002, for 2003, for 2004, and for the second, third and fourth quarters of 2005, that were accepted by the State of California.

The years at issue are 2002 and 2003 wherein the petitioner has not demonstrated the ability to pay the proffered wage

The Form DE-6 statement for the second and third quarters of 2002 evidence no wages paid in the second quarter of 2002 to the couple but \$31,100.00 paid to [REDACTED] in the third quarter of 2002 and \$18,700.00 paid to [REDACTED] in the third quarter of 2002. There are no other DE-6 statements in the record of proceeding for 2002.¹⁶ The suggestion that wage expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages are payroll expenses in those tax returns. Wages paid to employees are not discretionary expenditures. 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.

¹⁴ 8 C.F.R. § 204.5(g)(2).

¹⁵ It is unclear where on the petitioner's tax returns were shown these "set aside" funds which were not loans, current liabilities or notes payable but cash investments to support the petitioner's operations. For example in 2002, 2003 and 2004 no additional paid-in capital (Schedule L, Line 23) is shown. There is no Schedule L submitted for 2001.

¹⁶ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

According to the affidavits submitted by both individuals they set aside \$70,000.00 in 2002 from the salaries they had received from the corporation. However since the petitioner although requested, failed to submit a complete federal tax return for 2002, there is no independent objective evidence that they received more than \$58,188.00 in salaries in 2002. Therefore, the petitioner has not demonstrated that it had the ability to pay the proffered wage in 2002.

Examining the California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the four quarters of 2003, wages in the amount of \$96,000.00 were paid to [REDACTED] in 2003 and wages paid to [REDACTED] were in the amount of \$68,000.00. The Form 1120S stated net income of \$40,850.00 in 2003. According to the affidavits submitted, the couple set aside \$70,000.00 in 2003 from the salaries they had received from the corporation. That amount would have eliminated the short-fall meaning the additional amount necessary to pay the proffered wage over and above the petitioner's net income of \$40,850.00 in 2003.

However according to the affidavits of [REDACTED] and [REDACTED], the shareholders stated that each of them have "set aside" an amount each year as "discretionary" funds from the salaries they receive. The couple stated in their affidavits that these funds were utilized to pay the petitioner's current liabilities, expenses and wages if there were not enough funds to pay for yearly expenses. According to the shareholders these "set aside" funds were not loans, current liabilities or notes payable but cash investments to support the petitioner's operations.

Other than the statements in the affidavits submitted, there is no independent objective evidence that these discretionary funds exist, were earmarked for the purposes stated, nor evidence that the petitioner received such funds from the [REDACTED] in 2002 2003, 2004 or 2005. If the petitioner had profits in 2002 to 2005, it is unclear why it would have been necessary for the [REDACTED] to pay any money, after tax, already distributed to them as salaries, to make up shortfalls in the petitioner's current liabilities, expenses and wages that did not by an examination of the tax returns exist. According to the tax returns there were none outstanding by end of year.

Further, this is not a situation in which the shareholders are stating that the compensation of corporate officers can be re-directed, since there was no compensation of corporate officers stated in the returns. The salaries paid to the [REDACTED] for their labors (just as all their other employees were paid) were taxed and after payment to them is their money to keep. 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."

As stated, Counsel cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Counsel contends that the fact that the petitioner has been in business since 1992 and it had increased gross incomes and positives net incomes from 2002 to 2005. According to counsel in the totality of the circumstances of the case and evidence submitted, the petitioner is a viable and profitable business. Therefore this is evidence according to counsel of the petitioner's ability to pay the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the years in question, 2002 and 2003, the Form 1120S stated net incomes of \$8,388.00 and \$40,850.00 respectively. The petitioner's net current assets were not submitted for 2002 and in 2003 were only \$4,661.00. Counsel has not offered any explanation for these poor results for 2002 and 2003 in a company that had already been in business for ten years.

Although the prevailing wage established in this case is \$64,313.60 per year, the difference between that figure and what the beneficiary was paid for 2002 was \$50,193.60, for 2003 was \$48,626.20, for 2004 was \$48,256.98 and for 2005 was \$43,913.00. Although the petitioner is legally obligated only to pay the prevailing wage once the beneficiary achieves permanent residency, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date or in years 2002 and 2003 could have paid the proffered wage.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the period 2002 and 2003 was an uncharacteristically unprofitable year for the petitioner.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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 asserts that capital stock,¹⁷ and retained earnings are evidence of the ability to pay the proffered wage.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net

¹⁷ Capital stock and paid-in capital are not current asset items but rather the equity of the corporation as such it is unavailable to pay the proffered wage.

income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date in 2002 and 2003.

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.