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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **OCT 24 2005**
EAC 03 222 54980

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, Director
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Indian food specialties. 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 submits a brief and additional evidence.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually.

On the petition, the petitioner claimed that it was established in 1989, had 80 employees and a gross annual income of \$4673,424. In a cover letter submitted with the petition, counsel stated that the petitioner maintained three restaurants:

[REDACTED] New York. Counsel also stated that the petitioner's net loss of \$27,670 in 2001 should not be construed negatively. Counsel asserted that if cash flow items, totaling \$381,491, were considered, the petitioner's net loss could have been a net profit. Counsel identifies these cash flow items as a cash balance, identified in Line 1 of Schedule L, of \$172,707, depreciation expenses of \$97,689 as identified on line 21 of Schedule L, accrued expenses of \$62,185 which counsel identified as included in the \$16,342 identified as other current liabilities on Schedule L, and advertising expenses of \$48,910, which counsel described as a discretionary expenses that could have been used towards the payment of the proffered wage. Counsel also added that the petitioner possessed \$36,088 in accounts receivables

and \$125,855 in inventories, as identified on lines 2 and 3 of Schedule L, which were readily convertible to cash. Finally counsel noted that the petitioner had paid \$54,000 in compensation of officers. Counsel stated that the salaries and wages paid to waiters and cooks directly involved in the food preparation were purposefully included in the cost of goods sold, and the aggregate figure for this tax item was \$2,511,274.

Counsel also submitted Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, for the tax year 2002, and a letter of work experience for the beneficiary from his previous employer in India.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 23, 2003, the director requested additional evidence pertinent to that ability. The director noted that the petitioner's 2001 federal tax return indicated a net loss of \$27,291 and net current assets of -\$203,793. The director specifically requested that the petitioner provide copies of annual reports for 2001 and 2002 accompanied by audited or reviewed financial statements; the petitioner's 2002 federal corporate income tax return, with all schedules and attachments; and, if applicable, copies of the beneficiary's Form W-2 Wage and Tax Statements for 2001 and 2002.

In response, counsel stated that based on its 2001 Federal income tax return, the petitioner in 2001 realized a gross income of \$4,408,148, and gross profits of \$1,364,969. Counsel also noted that the petitioner in 2001 had paid out \$54,000 in officer compensation and declared \$1,270,460 as cost of labor. Counsel also stated that the petitioner in 2001 declared loans from shareholders of \$200,000, of which \$123,795 were paid for consultancies, management, and professional fees. Counsel stated that these amounts, when combined with the cost of labor of \$1,270,460, resulted in \$1,394,255 expended for staff or personnel services. Counsel stated that such a sum definitely established that the petitioner had the capacity to pay the beneficiary the proffered wage of \$39,291. Counsel also stated that the petitioner's cash flow and cash convertible items, such as cash on hand, inventories, and accounts receivable, totaled \$334,650, and that this sum could have covered the proffered wage by a significant margin of 752%. Counsel also stated that the discretionary expenses of combined depreciation of \$97,689 and the advertising expense of \$48,910 were available to pay the proffered wage as of the priority date.

Counsel stated that in the tax year 2002, the petitioner's gross sales were expected to be approximately \$3.77 million. Counsel submitted a letter from [REDACTED], the petitioner's accountant. Counsel also stated that the petitioner had three bank accounts in 2002 and the average monthly balances of these accounts demonstrated the availability of cash on hand to pay the beneficiary. The letter from [REDACTED] L.L.C., dated January 15, 2004, stated that the company was the petitioner's accountant, and that the corporate income tax return for the tax year 2002 was under extension. The accountant then stated that per records maintained by the client and made available to the accountant, the gross sales of the year 2002 were anticipated to be about \$3.77 million.

Counsel also submitted copies of three checking accounts maintained by the three restaurants owned by the petitioner. The Bank of New York bank 2001 and 2002 statements submitted by counsel for account number 630-1158686 were for the petitioner's [REDACTED] restaurant. The monthly balances varied from \$57.01 in February 2002 to \$16,209.54 in November of 2002. The second group of Bank of New York checking account statements, account number [REDACTED] and account number [REDACTED], was for the petitioner's restaurant at

Street in New York (the petitioner). These statements also showed varying account balances from January to November 2002. The third group of Bank of New York monthly statements for account number [REDACTED] was for the petitioner's restaurant at [REDACTED], New York City, and had varying monthly balances based on statements from January 2002 to November 2002.

Counsel also submitted Bank of New York monthly statements for the petitioner's West 44th Street restaurant from April to August of 2003. The account statements showed the following balances: \$61,230.02, \$18,522.26, \$299,814.12, \$68,562.51, and \$25,565.06.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 16, 2004, denied the petition. The director stated that the petitioner's 2001 federal income tax return did not indicate sufficient net current assets to pay the proffered wage, and that the bank statements submitted by the petitioner are only considered as supplemental documentation. The director stated that while the bank statements do establish a portion of a petitioner's net assets, they did not contain evidence of the company's outstanding current liabilities, and that for this reason, the Schedule L balance sheet filed with the petitioner's tax return is considered more probative evidence. The director then stated that there is no evidence in the record to indicate that the funds reported on the petitioner's bank statements somehow reflect additional available monies that were not reflected on the tax return.

On appeal, counsel reiterates that the petitioner has been in the restaurant business since 1989 and has experienced steady incremental growth during the last 15 years. Counsel asserts that currently the petitioner relies primarily on a small pool of part-time and seasonal workers for numerous jobs, but that with the steady increase of business activity and plans for expansion, the petitioner's need for a permanent, full-time position of Indian specialty cook has become compelling. Counsel also states that the director failed to take into account that the petitioner sought to reduce its taxable and net income by increasing the allowable tax deductions, a common practice utilized by virtually all accountants and tax professionals to limit tax liabilities. Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and states that the visa petition in *Sonogawa* was approved despite the fact that the petitioner's net profit was small. Counsel states that in the instant petition, the petitioner generates significant income and has experienced continual business growth with each passing year. Counsel also notes that the AAO has approved a visa petition in which the petitioner did not report a net profit for the year and cites to *In Re X* (EAC 92-096 51030), and *Matter of Oriental Pearl Restaurant* (12 Immig.Rptr B-3-43, 1993). Counsel states that in the instant petition, the employer was able to demonstrate a net profit.

Counsel also asserts that the petitioner paid out a significant amount in terms of salaries and wages, as well as its cost of labor. Counsel states that the beneficiary was in fact working for the petitioner during the period in question at a cash salary of approximately \$400 a week. Counsel notes that the director's financial analysis is "severely hobbled" as it fails to take into account that wages are generally paid on a bi-weekly basis and not on a year-end cumulative basis. Counsel states because of this pay basis, the focus of whether the petitioner has the financial capacity to pay the proffered wage should be narrowed to a monthly rather than an annual basis.

Although counsel states that the petitioner will submit a brief in support the appeal within thirty days after April 16, 2004, the AAO did not receive any further evidence or documentation. In response to an AAO FAX sent to counsel on September 27, 2005, enquiring as to whether a timely brief or further evidence had been submitted,

counsel submits additional evidence to the record. It is noted that the AAO FAX was sent to counsel to ensure that any additional appeal or brief materials filed timely but not found in the file were submitted to the AAO. Counsel submits additional documentation that consists of the petitioner's federal income tax returns for 2002 and 2003; however, he does not provide any evidence that the new documentation was actually submitted within the 30 days period of time allowed by Form I-290B.¹ Therefore the documentation received by the AAO in October 2005 will not be considered in these proceedings.

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statement(s) for 2002 and 2003. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. As noted by the director, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for its three restaurants somehow reflect additional available funds that were not reflected on the petitioner's 2001 tax return.

Upon review of the record, it is noted that the petitioner appears to combine the assets and liabilities of all three of its restaurants in its 2001 federal income tax return. The Form ETA 750 indicates that the beneficiary would work at the petitioner's [REDACTED] restaurant in New York City. Based on the ETA 750, the petitioner would need to provide some clarification as to the financial viability of the particular restaurant in which the beneficiary would be employed. Furthermore, the petitioner is a corporation and files its taxes on Form 1120. Citizenship and Immigration Services (CIS), formerly the Service or CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner or of other corporations to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

In addition, counsel, in his response to the director's request for further evidence, examined items in the petitioner's tax return such as officer compensation, cost of labor, and a loan from shareholders of \$200,000, of which \$123,795 were paid for consultancies, management, and professional fees. Counsel asserted that the combined sum of these expenditures was \$1,394,255 and that such a sum definitely established that the petitioner had the capacity to pay the beneficiary the proffered wage of \$39,291. Counsel also stated that the petitioner's cash flow and cash convertible items, such as cash on hand, inventories, and accounts receivable could have covered the proffered wage, and that the discretionary expenses of combined depreciation of \$97,689 and the advertising expense of \$48,910 were also available to pay the proffered wage as of the priority date. Counsel's assertions are not found persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record

¹ Based on the dates in which these two tax returns were filed or prepared, neither document would have been available to be submitted within the 30 days allowed by the I-290B.

without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, counsel's assertion that depreciation or discretionary advertising expenses can be utilized to augment the petitioner's ordinary income is not supported by relevant precedent decisions. 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 that 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. (Original emphasis.) *Chi-Feng* at 537.

In addition, the AAO does consider tax return items such as cash on hand, and inventories, in its examination of the petitioner's net current assets, as documented by Schedule L of the petitioner's income tax form.²

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. Although on appeal, counsel indicates that the beneficiary has been working for the petitioner and earning \$400 a week, no evidence to further substantiate this assertion is found in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, even if substantiated, such a weekly salary would not establish that the petitioner paid the beneficiary a salary equal to or greater than the proffered wage for part of the period of time in question. Based on an annual salary of \$39,291.20, the beneficiary's weekly salary would have to be at least \$775.60.³ Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, such as advertising 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, contrary to counsel's assertions with regard to the actual sum paid in wages, salaries, cost of labor, and consultancies by the

² The petitioner's net current assets are examined further in these proceedings.

³ The yearly salary of \$39,291.20 divided by 52 weeks.

petitioner, 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 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, now CIS, should have considered income before expenses were paid rather than net income. As correctly noted by the director, the petitioner's net income for 2001 was -\$27,670. This sum is insufficient to pay the proffered wage.⁴

Although counsel in his response to the director's request for further evidence and on appeal suggests that depreciation and advertising expense figures, as discretionary expenses, could be used to pay the proffered wage, 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.

Nevertheless, counsel is correct that 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. As correctly noted by counsel, such assets can include inventories, cash on hand, and other current assets. Contrary to counsel's assertions, items such as loans to shareholders are not considered as evidence of the petitioner's current liabilities or assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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's tax return reflect the following information for tax year 2001:

	2001
Taxable income ⁶	\$ -27,670

⁴ Although the two federal tax returns submitted untimely by counsel are not considered in these proceedings, it should be noted that even if they had been considered, the petitioner's net income in 2002 and 2003 was -\$194,344 and -\$672,629. Neither sum would have been sufficient to cover the proffered wage.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

Current Assets	\$ 334,650
Current Liabilities	\$ 538,443
Net current assets	\$ -203,793

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$27, 670, and negative net current assets of \$203,793, and has not, therefore, demonstrated the ability to pay the proffered wage, based either on its taxable income or net current assets.⁷

On appeal, counsel cites to the precedent decision, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This decision 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.

No 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. To the contrary, counsel states on appeal that the petitioner generates significant income and has experienced continual business growth with each passing year. This assertion, if substantiated, would support a finding of the petitioner's sustained business viability. However, neither counsel nor the petitioner provide any further financial information as to the petitioner's business operations for the years preceding 2001 or following 2001. Therefore the petitioner has not established that 2001 was an uncharacteristically unprofitable year, or that in spite of the negative taxable income in 2001, the petitioner continued to experience business growth, and has reasonable expectations of future growth. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). With regard to other decisions cited by counsel, it is noted that *In Re X*, is not a precedent decision. 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).

⁷ As stated previously, the petitioner's tax returns for 2002 and 2003 are not considered in these proceedings. If they had been considered, the petitioner's net current assets for 2002 is -\$121,624 and for 2003 is -\$122,846. Neither net current assets figure is sufficient to pay the proffered wage.

Furthermore, *Matter of Oriental Pearl Restaurant* (12 Immig.Rptr B-3-43, 1993) is a decision that involves non-immigrant H-1B visa petitions, as opposed to employment-based immigrant visa petitions.

It is noted that based on its 2001 federal income tax return, the petitioner in 2001 paid out \$1,270,460 in labor costs and claims to have 80 employees. It also noted that counsel described the petitioner's work force as 80 employees who are seasonal and part-time and that the petitioner, twelve years after its establishment in 1989, now needs permanent fulltime cooking staff to handle a steady increase of business activity and plans for expansion. *Matter of Sonegawa*, supra, provided for approval of petitions where the petitioner's net profit is small or where the petitioner shows a loss if the petitioner's expectations of continued increase in business and increasing profits are reasonable. In the instant petition, the petitioner has not provided sufficient evidence, beyond counsel's assertions, that the petitioner's expectations of increasing profits are reasonable. The record contains no further evidence with regard to the petitioner's actual work force, increase in profits or business operations over a larger period of time, or its plans for expansion. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Without more persuasive evidence, the petitioner has not demonstrated that, within the totality of its circumstances, its expectation of future profits is reasonable. The petitioner has not, therefore, shown the ability to pay the proffered wage as of the 2001 priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.