



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B6

APR 18 2007

FILE:

WAC 04 250 50295

Office: CALIFORNIA SERVICE CENTER

Date:

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 Director, California Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office 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 specialty cook. 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 the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for 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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on April 26, 2001. The labor certification states that the position requires two years of experience in the job offered.

On the Form I-140 petition the petitioner claimed to have two employees and to have been established on August 3, 1998. On the Form ETA 750, Part B the beneficiary, who signed that form on April 18, 2001, did not claim to

have worked for the petitioner.¹ The beneficiary did claim, however, to have been self-employed from January 1995 to August 1998 as a restaurant owner/cook at the address now occupied by the petitioner. The beneficiary also claimed to have worked as a cook at the Thai Dish restaurant in Boston, Massachusetts, from May 1992 to October 1994.

Subsequently the petitioner submitted an amended work history, dated November 28, 2003, for the beneficiary. In that amended history the beneficiary's claim of employment at the [REDACTED] restaurant is unchanged. The beneficiary claims self-employment as a cook in his own restaurant at the petitioner's current address² from January 1995 to August 1998, when he sold the business.

The beneficiary claimed, in addition to have worked for the petitioner from April 1998 to April 2001. As the beneficiary indicated that he was self-employed as a cook at his restaurant at that same location until August of 1998, and as the petitioner indicated that it did not come into existence until that month, that employment cannot have begun before that month. This office suspects that the discrepancy is the result of a typographical error.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³

In the instant case the record contains (1) an employment verification letter dated April 11, 2001, (2) an employment verification letter dated September 30, 2005, (3) California Form DE-6 Quarterly Wage and Withholding Reports, (4) a Federal Form 941 Employer's Quarterly Federal Tax Return, (5) a Federal Form 941c Supporting Statement to Correct Information, (6) Form W-2 Wage and Tax Statements, (7) three checks drawn by the petitioner's owner against the petitioner's business checking account, (8) a letter dated April 28, 2005 from the petitioner's owner, (9) Form 1040 U.S. Individual Income Tax Returns and Los Angeles Public Health Operating Permits showing that the beneficiary owned the petitioning restaurant prior to August 1998, (10) various documents showing that the petitioner's current owner acquired it during or about August of 1998, (11) documents issued August 20, 2000 and August 20, 2004 showing that a restaurant association and the Los Angeles County Health Department certified the beneficiary as a food handler, (12) an August 2, 2005 declaration by the petitioner's owner, and (13) an October 17, 2005 declaration by the beneficiary. The record does not contain any other evidence relevant to the beneficiary's claims of qualifying employment experience.

¹ The instructions on that form instruct the beneficiary to, "List all jobs held during the last three years" and "any other jobs related to the [proffered position]."

² That employment history indicates that the restaurant was called [REDACTED] Restaurant, just as the petitioning entity, at the same address, is called today.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The April 11, 2001 employment verification letter is from the [REDACTED] restaurant in Boston Massachusetts and states that the beneficiary worked at that restaurant as a cook from May 1992 to October 1994. That letter is signed by [REDACTED] whose position at that restaurant, if any, is not stated. This office notes that the affiant has the same family name as the beneficiary.

The September 30, 2005 employment verification letter is from the owner of the [REDACTED] restaurant in Boston, Massachusetts. The writer stated that she previously owned the [REDACTED] restaurant and that that the beneficiary worked there as a cook from May of 1992 to October of 1994.

The writer further stated,

Unfortunately, there are no pay records for [the beneficiary's] term of employment as he did not have a bank account. And most of small restaurants [sic] pay their employees cash. I had to do so with [the beneficiary]. [The beneficiary received between \$450 and \$475 in cash per week to work at my restaurant.

The California Form DE-6 Quarterly Wage and Withholding Reports submitted cover all four quarters of 2004 and the second quarter of 2005. The 2004 forms show that the petitioner paid the beneficiary \$1,800 during each of those quarters, for a total of \$7,200 during 2004. The petitioner also employed another worker whom it paid a total of \$10,400 during 2004. The 2005 form shows that the petitioner paid the beneficiary \$3,868 and paid its sole other employee \$2,800 during the second quarter.

The Federal Form 941 quarterly return submitted shows that the petitioner paid total wages of \$6,668 during the second quarter of 2005. The Federal Form 941c shows that the petitioner amended its first quarter 2005 wages from \$3,800 to \$4,200.

The W-2 forms provided show that the petitioner paid the beneficiary total remuneration of \$2,000, \$2,400, \$7,200, and \$7,200 during 2001, 2002, 2003, and 2004, respectively.

The three checks drawn by the petitioner's owner were payable to the order of the beneficiary in the amounts of \$1,456.67, \$1,526.04, and \$1,456.07 on May 31, 2005, June 30, 2005, and July 31, 2005.

The petitioner's owner's April 28, 2005 letter states that the beneficiary began working for the petitioner during 1998 and continued until a fire closed the restaurant on September 25, 2001, then returned to work part-time when the restaurant opened in July 2002, where he continued to work on the date of that letter.

In her August 2, 2005 declaration the petitioner's owner stated that her family in Thailand has known the beneficiary's family for many years. In his October 17, 2005 declaration the beneficiary stated that he owned the restaurant that is now petitioning for him from 1995 to August 1998 and that during that time he was the sole worker at the restaurant.

The beneficiary's October 17, 2005 declaration states that the beneficiary owned the [REDACTED] restaurant from 1995 until he sold it during August 1998.

The director denied the petition on August 29, 2005. In addition to finding that the evidence does not demonstrate that the beneficiary is qualified for the proffered position the director noted that the friendship between the beneficiary's family and the petitioner's owner's family casts doubt on the validity of the job offer.

On appeal, counsel asserted that the beneficiary's first employment verification letter, from [REDACTED] is convincing evidence of the validity of the beneficiary's claim of employment at [REDACTED] restaurant, notwithstanding that it was written by someone with the same family name as the beneficiary. Counsel did not state whether [REDACTED] is related to the beneficiary by blood or marriage.

Counsel also indicated that the letter from the previous owner of the [REDACTED] restaurant is also convincing evidence in support of the beneficiary's claim of qualifying employment, stating, "The employer has justified it [sic] failure to provide [contemporaneous documentary evidence of that employment] as it is not available for cash businesses such as restaurants."

Counsel also stated that the DOL found, in approving the Form ETA 750 submitted with the petition, that the beneficiary is qualified for the proffered position, and that this determination should be accorded considerable weight. Counsel cites *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 485 F. Supp. 345, 346 (1980) for the proposition that CIS does not have the statutory authority to determine whether the beneficiary is qualified for the proffered position.

Counsel is correct that the district court in *Stewart Infra-Red*, ruled that CIS authority does not extend to determining whether a beneficiary is qualified for a position previously certified by DOL. That decision, however, was overturned by the circuit court in *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In that decision the court found that determining whether a beneficiary is qualified for a proffered position is manifestly within the ambit of CIS' authority, thus overruling the precedent upon which counsel relies.

Considerable statutory, regulatory, and precedential support exists, in addition to the case cited by counsel, for the proposition that CIS is, in fact, charged with determining whether the beneficiary has been shown to be qualified to perform in the proffered position. A discussion of that support follows.

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to the regulation at 20 C.F.R. § 656.20(c), as in effect at the time of filing,⁴ an employer applying for a labor certification must “clearly show” that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay 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;
- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis;
- (4) The employer will be able to place the alien on the payroll on or before the date of the alien’s proposed entrance into the United States;
- (5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
- (6) The employer’s job opportunity is not:
 - (i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
 - (ii) At issue in a labor dispute involving a work stoppage;
- (7) The employer’s job opportunity’s terms, conditions and occupational environment are not contrary to Federal, State or local law; and
- (8) The job opportunity has been and is clearly open to any qualified U.S. worker.
- (9) The conditions of employment listed in paragraphs (c) (1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the Application for Alien Employment Certification form.

The regulation at 20 C.F.R. § 656.21(a) requires the ETA 750 to include:

- (1) A statement of the qualifications of the alien, signed by the alien; [and]
- (2) A description of the job offer for the alien employment, including the items required by paragraph (b) of this section.

⁴ Recently the Department of Labor has promulgated new regulations regarding the labor certification process. These new regulations only apply to applications filed on or after the effective date of the regulations, March 28, 2005. Applications filed before March 28, 2005, such as the one before us, are to be processed and governed by the current regulations quoted in this decision. 69 Fed. Reg. 77326-01 (Dec. 27, 2004).

Finally, the regulation at 20 C.F.R. § 656.24(b) provides that the DOL Certifying Officer shall make a determination to grant the labor certification based on whether or not:

(1) The employer has met the requirements of this part. However, where the Certifying Officer determines that the employer has committed harmless error, the Certifying Officer nevertheless may grant the labor certification, Provided, That the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. Where the Certifying Officer makes such a determination, the Certifying Officer shall document it in the application file.

(2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:

(i) The Certifying Officer, in judging whether a U.S. worker is willing to take the job opportunity, shall look at the documented results of the employer's and the Local (and State) Employment Service office's recruitment efforts, and shall determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers.

(ii) The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed, except that, if the application involves a job opportunity as a college or university teacher, or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien.

(iii) In determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as are appropriate and shall look to the nationwide system of public employment offices (the "Employment Service") as one source.

(iv) In determining whether a U.S. worker is available at the place of the job opportunity, the Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expenses, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer's expense.

(3) The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

It is significant that none of the above inquiries assigned to DOL involve the determination of whether or not the alien is qualified for the job offered. This has been noted by various Federal Circuit Courts of Appeals, in addition to the First Circuit in *Stewart Infra-Red Commissary*:

There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [currently found at 212(a)(5)(A)(i)]. *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on this decision, the Ninth Circuit Court of Appeals, which has jurisdiction over this matter, stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Id. at 1009 (emphasis added). The Ninth Circuit reached a similar decision one year later in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

736 F. 2d 1305, 1309 (9th Cir. 1984). See also *Black Const. Corp. v. I.N.S.*, 746 F.2d 503 (9th Cir. (Guam) 1984) (rejecting argument that once employer's labor certifications had been approved by DOL it was error for INS to deny related immigrant petitions for failure to meet preference status requirements).

The key to determining the job qualifications specified in the labor certification is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing *Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

We turn, then, to an analysis of the evidence in the instant case pertinent to the beneficiary's claims of qualifying experience.

Counsel leans heavily upon the beneficiary's claim of employment at [REDACTED] in Boston. The letter counsel initially submitted in support of the beneficiary's claim of qualifying employment experience was from a person with the same last name as the beneficiary. Further, that letter did not identify the writer's position at that previous place of employment as required by 8 C.F.R. § 204.5(1)(3)(ii)(A). The service center found the circumstances of this employment verification letter suspicious. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In response, without confirming or refuting the implication that the previous affiant may be related to the beneficiary, or demonstrating, or even alleging, that the first affiant owned, managed or had any other position at that restaurant, counsel submitted a second employment verification letter pertinent to the same employment claim. That letter reiterates and supports the beneficiary's claim of qualifying employment experience. That letter states, however, that no records are available of the beneficiary's employment. This employment claim, called into question by the fact that an apparent relative initially attested to it, has not been sufficiently supported on appeal.

The remaining employment claim is the beneficiary's claim of employing himself at the premises now occupied by the petitioner. This office does not accept that attestation as convincing evidence of qualifying employment.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. The petitioner has not submitted corroborating evidence of the beneficiary's self-employment such as the beneficiary's tax returns, corporate tax returns, business licenses, or other indices that the beneficiary gained experience as a cook. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this ground, which ground has not been overcome on appeal.

As the director also noted, the validity of the job offer in this case is also in question. The beneficiary previously owned the petitioning restaurant. This in itself calls into question whether he has an arms-length relationship with the present owner. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood, by marriage, through friendship, or where the two have a financial relationship. See *Matter of Summart*, 374, 2000-INA-93 (May 15, 2000). This suspicion is further elevated by the fact that on the Form I-140 petition the beneficiary listed his address as [REDACTED] in Granada Hills, California, and the petitioner's owner listed that same address as her home on her August 2, 2005 affidavit.

Although the possibility that the job offer might not be valid was mentioned in the decision of denial that decision did not make clear whether it was relying upon that as an additional basis for denial. The petition should have been denied on that ground, if it was not. If it was, that additional basis has not been overcome on appeal.

The record suggests yet another basis for denial that was not addressed in the decision of denial.

The petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date pursuant to 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is April 26, 2001. The proffered wage is \$9.50 per hour which equals \$19,760 per year.

The petitioner's owner submitted his 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns. Schedules C attached to each of those returns show that the person identified as the petitioner's owner in the record of proceedings owned the petitioner as a sole proprietorship during each of the salient years.

Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of her own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that she could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, she must show that she could still have sustained herself and her dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner's owner's 2001 adjusted gross income, including the petitioner's profit offset by deductions, was \$14,572. The 2001 W-2 form submitted shows that the petitioner paid the beneficiary \$2,000 during that year. The sum of those amounts is \$16,572. That amount is insufficient pay the proffered wage. The

petitioner provided no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner failed to show the ability to pay the proffered wage during 2001.

The petitioner's owner's 2002 adjusted gross income, including the petitioner's profit offset by deductions, was a loss of \$903. The 2002 W-2 form submitted shows that the petitioner paid the beneficiary \$2,400 during that year. The sum of those amounts is \$1,497. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner failed to show the ability to pay the proffered wage during 2002.

The petitioner's owner's 2003 adjusted gross income, including the petitioner's profit offset by deductions, was \$3,778. The 2003 W-2 form submitted shows that the petitioner paid the beneficiary \$7,200 during that year. The sum of those amounts is \$10,978. That amount is insufficient pay the proffered wage. The petitioner provided no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner failed to show the ability to pay the proffered wage during 2003.

The petitioner's owner's 2004 adjusted gross income, including the petitioner's profit offset by deductions, was \$17,139. The 2004 W-2 form submitted shows that the petitioner paid the beneficiary \$7,200 during that year. The sum of those amounts is \$24,339. That amount is greater than the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of her adjusted gross income, however, she would have been left with \$4,579 with which to support herself. The petitioner's owner stated in her April 29, 2005 statement that her recurring monthly expenses are approximately \$1,900 per month,⁵ which equals \$22,800 per year. The petitioner's owner would not have been able to pay the proffered wage out of her adjusted gross income and retained enough to meet her expenses. The petitioner provided no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner failed to show the ability to pay the proffered wage during 2004.

Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue, and may also be required to present evidence of its ability to pay the proffered wage during subsequent years.

⁵ The petitioner listed a monthly mortgage payment of \$1,218.67, a monthly automobile and insurance payment of \$400, \$500 in gasoline per year (\$41.67/mo.), \$26 per month for gas, \$26 per month for telephone, \$100 per month for electricity, homeowner's insurance of \$650 per year (54.17/mo.), and \$40 per month for food.

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.