

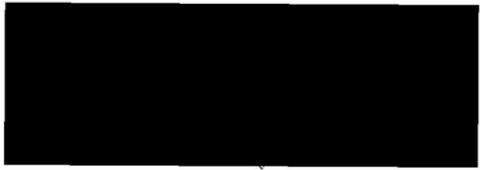
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: FEB 01 2007
EAC 03 155 51996

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:
[REDACTED]

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 Acting Director, Vermont Service Center, denied the instant employment-based preference visa petition. Pursuant to a motion the Director, Vermont Service Center,¹ reopened the matter and denied the petition again. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a housekeeping/cleaning service. It seeks to employ the beneficiary permanently in the United States as a housekeeping/janitorial services supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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. The director affirmed that decision.

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 decisions of the acting director and the director 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 granting 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 March 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.13 per hour, which equals \$35,630.40 per year.

¹ Sometime between the decision on the appeal and the decision on the motion a permanent director was appointed to the service center.

On the Form ETA 750, Part B, signed by the beneficiary on April 17, 2001, the beneficiary did not claim to have worked for the petitioner. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Burke, Virginia.

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.²

In the instant case the record contains (1) copies of the petitioner's owner's 2000, 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Return, (2) a 2003 Form 1099 Miscellaneous Income statement, (3) copies of paychecks the petitioner issued to the beneficiary, (4) a copy of the petitioner's Form 941 Employer's Quarterly Tax Return for the second quarter of 2002, (5) copies of monthly statements pertinent to the petitioner's owner's bank account, (6) a copy of a rental agreement dated April 1, 2004 between the petitioner's owner and a residential tenant to lease the property [REDACTED] Virginia, (7) a summary showing residential properties, including the petitioner's owner's rental property, listed for sale, (8) a copy of a credit agreement dated September 22, 1999, (9) a loan statement dated September 16, 2004 pertinent to a mortgage loan secured by the property at [REDACTED], Virginia and showing the amount then owed on that mortgage to be \$183,071, (10) a title guarantee dated June 27, 1990, (11) a copy of an agreement dated November 16, 2000, and (12) a notarized letter dated February 21, 2003 from the petitioner's owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Schedules C attached to the petitioner's owner's tax returns show that the petitioner is a sole proprietorship and the petitioner's owner indicated that she was single and had no dependents during the years those returns cover.

The Schedule C attached to the petitioner's owner's 2000 tax return shows that the petitioner returned a profit of \$31,656 during that year. The petitioner's owner declared adjusted gross income of \$29,476 during that year, including all of the petitioner's profit. This office notes, however, that because the priority date of the visa petition is March 30, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Schedule C attached to the petitioner's owner's 2001 tax return shows that the petitioner returned a profit of \$39,490 during that year. The petitioner's owner declared adjusted gross income of \$36,810 during that year, including all of the petitioner's profit.

² 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 Schedule C attached to the petitioner's owner's 2002 tax return shows that the petitioner returned a profit of \$29,144 during that year. The petitioner's owner declared adjusted gross income of \$27,085 during that year, including all of the petitioner's profit.

The Schedule C attached to the petitioner's owner's 2003 tax return shows that the petitioner returned a profit of \$21,662 during that year. The petitioner's owner declared adjusted gross income of \$20,131 during that year, including all of the petitioner's profit.

The paychecks demonstrate that the petitioner paid the beneficiary \$9,240 during 2003 and \$6,979 during 2004. The 2003 Form 1099 Miscellaneous Income statement shows that the petitioner paid the beneficiary \$12,420 in non-employee compensation during that year. The petitioner's quarterly return shows that the petitioner paid total wages of \$1,500 during the second quarter of 2002.

The rental agreement appears to show that the petitioner's owner owns a property at [REDACTED] in Burke, Virginia and leases it to a tenant for \$1,000 per month. The property summary shows that the property is listed for sale for \$495,000.

The September 22, 1999 credit agreement shows that a commercial lender accorded the petitioner's owner a \$17,000 home equity line of credit secured by a deed of trust, presumably at least a second, on a property in Burke. That property was not otherwise identified. The petitioner's owner's home address is identified in that document as [REDACTED] in Burke, Virginia.

The June 27, 1990 title guarantee indicates that the petitioner's owner and [REDACTED] subdivision mortgaged in the amount of \$175,000 and insured in the amount of \$195,000,

The November 16, 2000 agreement is between a construction contractor and the petitioner. That agreement indicates that the petitioner wishes to be considered for future work by the construction contractor, presumably cleaning construction sites or newly constructed buildings. It does not state any minimum amount of work to be awarded to the petitioner nor does it state the amount the petitioner would be paid for work.

The petitioner's owner's February 21, 2003 letter states that the petitioner ". . . will continue to employ [the beneficiary] . . . with a salary of \$8.17 per hour . . . [p]ursuant to the terms and conditions of the [approved Form ETA 750 labor certification.]" This office notes that employment of the beneficiary for \$8.17 per hour is not within the terms of the approved labor certification.

The acting director denied the petition on September 15, 2004. The petitioner moved that the matter be reopened and reconsidered. On June 3, 2005 the director reopened and reconsidered the matter and denied the petition again.

In previous letters, on the motion, and on appeal, counsel asserted that the wage proffered in this case is \$8.17 per hour, rather than \$17.13 per hour as is stated on the Form ETA 750, and that the predominant wage was

incorrectly stated on the Form ETA 750 labor certification upon which the petition relies. Counsel provided evidence that the predominant wage for the proffered position is \$8.17 per hour.

Counsel asserted that the petitioner's gross receipts, salary expense, wage expense, contract labor expense and other expenses, demonstrate its ability to pay the proffered wage. Counsel also stated, "The petitioner has a favorable enough ratio of current assets to total current liabilities," but did not demonstrate the amount of the petitioner's current assets or current liabilities.

Further, counsel stated, "We must consider the fact that for taxable income determination there are many items such as depreciation, special deductions and credits that reduce the taxable income but do not decrease the company's cash flow." Counsel observed that a company's net income as stated on its tax returns may not accurately reflect its ability to pay additional wages and asserted that the petitioner has always met its payroll obligations. Counsel also cited the petitioner's owner's equity in real estate as a fund available to pay additional wages.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Showing that the petitioner paid salaries and wages in excess of the proffered wage, or greatly in excess of the proffered wage, or that it paid some amount for contract labor, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

This office is not convinced by counsel's argument that the petitioner's current ratio, the ratio of its current assets to its current liabilities, shows the petitioner's ability to pay the proffered wage.

In a November 16, 1994 transcript the Director, Vermont Service Center, stated that a sufficiently favorable ratio of current assets to current liabilities would lead the Service Center to the assumption that the petitioner

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage. The petitioner might also have demonstrated that contractors had performed the duties of the proffered position, and that hiring the beneficiary would obviate those contractors, and that the dollar amount paid for the number of hours of contract labor the beneficiary would obviate would be sufficient to pay the proffered wage. Neither of those alternatives, however, was demonstrated nor even alleged.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

is able to pay a proffered wage. Notwithstanding this statement by the Director, Vermont Service Center,⁵ however, the current ratio is a measure of a petitioner's ability to cover its existing debts with its existing liquidity. It is not a measure of the ability to absorb additional expenses. Unlike the petitioner's current ratio, its net current assets, that is, the difference between the petitioner's current assets and its current liabilities is an index of the ability to absorb additional expenses, such as additional wages.

This office considers net current assets greater than the annual amount of the proffered wage to be a valid indicator of a petitioner's ability to pay the proffered wage during a given year. This office will not typically, however, consider the petitioner's current ratio.

Further, the record in the instant case contains scant evidence pertinent to the petitioner's current assets or its current liabilities.⁶ This office is unable, therefore, to compute the current ratio or its net current assets. The basis for counsel's assertion that the ratio is favorable is unknown to this office. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁷ Counsel appears to be asserting that the real cost of long-term

⁵ This office is not bound by the opinion of the Director, Vermont Service Center.

⁶ Neither current assets nor current liabilities are listed on a sole proprietorship's Schedule C as they are on, for instance, the Schedule L of a corporation.

⁷ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets

tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Although counsel stated that special deductions and tax credits can decrease taxable income, counsel offered no evidence or argument to demonstrate that in this particular case special deductions and tax credits caused the petitioner's owner's tax return to misrepresent the financial condition of the petitioner or the petitioner's owner. If the financial condition of the petitioner and the petitioner's owner was affected by such deductions and credits and the failure to consider them prejudiced the petitioner's case, this matter may be addressed on motion.

In general, however, this office is not swayed by assertions that a petitioner's tax returns are poor indices of its financial condition. The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. If a petitioner chooses to demonstrate its ability to pay the proffered wage with tax returns then this office will generally rely on the numbers on those returns, without amendment. A heavy burden is then placed on the petitioner to demonstrate that those numbers should be altered to provide a more accurate assessment of its ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁸ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The November 16, 2000 agreement in this matter is actually more like a letter of intent than a contract. It indicates that the petitioner hopes to receive some business from a building contractor and describes certain conditions pursuant to which a contract might subsequently be awarded. It does not indicate that any such contract will necessarily ensue, or what fee will be paid for any business subsequently contracted. Even if it did, this would not demonstrate that the petitioner's future profits are likely to improve or even that they are likely to remain stable. That letter of intent is not convincing evidence of the petitioner's ability to pay the proffered wage.

during the salient years.

⁸ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Although whether all of the evidence submitted pertinent to real estate relates to the property at [REDACTED] Virginia is unclear this office will, for the sake of analysis, assume that they do. Three elements would be required to demonstrate the value of the petitioner's owner's equity in that real estate. The petitioner must establish ownership of real property, the market value of that property, and the amount of any indebtedness encumbering the property.

The petitioner has established that its owner and [REDACTED] held the property at [REDACTED] in Burke, Virginia on June 27, 1990. That does not, in itself, demonstrate that the petitioner's owner had any interest in that property on the priority date or at any time during the pendency of this petition.

The petitioner has established that the subject property was offered for sale, apparently during 2004 or 2005,⁹ for \$495,000. The amount for which an owner is willing to sell his or her property is a poor index of its market value. The record contains no other indication of the property's market value.

The petitioner has submitted evidence that the property was encumbered, apparently pursuant to a first deed of trust, on June 27, 1990 in the amount of \$175,000. On September 22, 1999 the property was encumbered by an additional \$17,000 home equity line of credit. On September 16, 2004 the property was subject to a mortgage loan of \$183,071, possibly as the result of the refinance of the other two loans on the property. That the property has been subject to no other encumbrances during the pendency of the visa petition has not been demonstrated nor even alleged.

Further, even if the value of the petitioner's owner's equity in that property were demonstrated, equity in real estate is not the sort of liquid asset readily available to pay wages. The petitioner's owner apparently owns only a partial interest in the property. Such partial interests are not necessarily readily salable.

Whether the petitioner's owner has owned the subject property throughout the pendency of the instant petition, even in part, is unknown. The value of the subject property is unknown. The amount by which the property has been encumbered during the pendency of the petition is unknown. Whether the petitioner's owner's interest, if any, is readily salable as necessary to pay the debts and obligations is unknown.

Further still, if the petitioner were urging that the petitioner's owner's ability to further encumber the property should be considered in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date, this would raise an additional issue, in addition to the issues listed above. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the

⁹ In addition to listings for sale, the property summary also lists settled sales. All of the settlements listed occurred from June 2004 through October 2004.

petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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, 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. (Reg. Comm. 1967).

Counsel's assertion that the petitioner has always met its payroll obligations, besides not being supported by any evidence in the record, is not controlling here. The inquiry before this office is not whether the petitioner has sustained its payroll in the past, but whether it has demonstrated that it has been capable of absorbing additional payroll expense since the priority date, and remains able to absorb that additional expense.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$12,420¹⁰ during 2003 and \$6,979 during 2004.¹¹

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's owner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their 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 is obliged to demonstrate that she could have paid her existing business expenses and the proffered wage, and still supported herself on her remaining adjusted gross income and assets.

¹⁰ This is the amount shown on the 2003 Form 1099.

¹¹ This is the total shown on the paychecks submitted. This office appreciates that other evidence might, if submitted, have demonstrated that the petitioner paid the beneficiary some greater amount during that year. No such other evidence, however, was submitted.

Counsel's argument that the wage proffered in the instant case is less than that shown on the approved labor certification is inapposite. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Counsel may not, if filing the Form I-140 petition, or on motion, or on appeal, alter the proffered wage as stated on the Form ETA 750.

The proffered wage is \$35,630.40 per year. The priority date is March 30, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$36,810. If the petitioner's owner had been obliged to pay the proffered wage out of that amount that would have left her with \$1,179.60 with which to support herself. To believe that the petitioner's owner could support herself for a year on that amount is unreasonable. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$27,085. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$20,131. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2003.

The petition in this matter was submitted on April 18, 2003. On that date the petitioner's owner's 2004 tax return was unavailable. A request for evidence was issued in this matter asking for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's owner's tax return was still unavailable. The petitioner is excused from the obligation of demonstrating its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The petitioner has made clear that it no longer proposes to employ the beneficiary at the wage specified on the labor certification, and perhaps never did. If the petitioner does not propose to employ the beneficiary pursuant to the terms of the approved labor certification then it may not use that labor certification to support the instant petition. If the instant petition is not supported by a valid labor certification then it may not be approved. Because the decision of denial did not discuss this issue, and the petitioner has not been accorded

an opportunity to respond to it, today's decision is not based on this issue, even in part. If the petitioner attempts to overcome today's decision on motion it should address this issue.

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

ORDER: The appeal is dismissed.