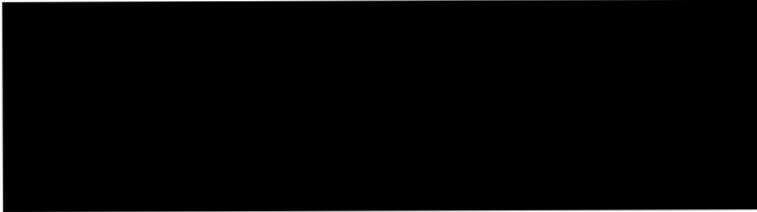




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and Immigration  
Services

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Office: TEXAS SERVICE CENTER Date:

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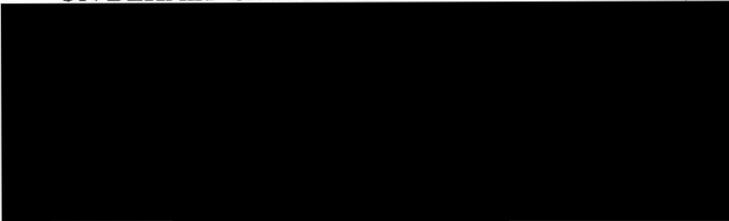
Petitioner:

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, Texas Service Center, denied the preference visa petition that 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 foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. 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 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 either 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *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 \$10.09 per hour, which equals \$20,987.20 per year.

The Form I-140 petition in this matter was submitted on February 14, 2006. On the petition, the petitioner stated that it was established on July 11, 1989 and that it employs 25 workers. The petition states that the petitioner's gross annual income is \$1,609,692. The petitioner left blank the space reserved for it to report its net annual income. On the Form ETA 750, Part B, signed by the beneficiary on February 1, 2006, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Santa Monica, California.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>1</sup> In the instant case the record contains (1) the petitioner's 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, (3) an unaudited income statement for the year ended March 31, 2006, and (4) copies of monthly statements pertinent to the petitioner's bank account. 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.

The petitioner also provided the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return and Form 1040X Amended U.S. Individual Income Tax Return.

The petitioner's tax returns show that it is a corporation, that it incorporated on July 11, 1989, and that it reports taxes pursuant to cash convention accounting. As will be further illustrated below the petitioner had reported taxes pursuant to a fiscal year running from April 1 of the nominal year to March 31 of the following year, but subsequently converted to calendar year reporting.

During its 2002 fiscal year, which ran from April 1, 2002 to March 31, 2003, the petitioner declared taxable income before net operating loss deduction and special deductions<sup>2</sup> of \$100,816. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2003 fiscal year, which ran from April 1, 2003 to March 31, 2004, the petitioner declared taxable income before net operating loss deduction and special deductions of \$0. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2004 fiscal year, which ran from April 1, 2004 to March 31, 2005, the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,503. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On April 1, 2005 the petitioner elected subchapter S corporate status. It also elected to change its tax-reporting period to the calendar year. As a result, its nominal 2005 tax return covers only the period from April 1, 2005 through the end of the 2005 calendar year. During that period the petitioner declared Schedule

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<sup>1</sup> 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).

<sup>2</sup> In the case of a subchapter C corporation, this office considers Line 28, taxable income before net operating loss deduction and special deductions, to be its net income for the purpose of determining whether it has demonstrated its ability to pay the proffered wage during a given year.

K, Line 17e income reconciliation<sup>3</sup> of \$13,678. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director denied the petition on August 16, 2006.

On appeal, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petitioner may submit other evidence in addition to that required by 8 C.F.R. § 204.5(g)(2), to show that the totality of circumstances demonstrates a reasonable expectation of increased profits, thus demonstrating the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel cited the increase in the petitioner's gross profits as evidence that it has a reasonable expectation of increased profits.

Counsel also asserted that the petitioner's tax returns do not accurately reflect its ability to pay additional wages because the petitioner's financial position is skewed on those returns by "several tax maneuvers designed to minimize taxation (as discussed below) . . ." Counsel did not further discuss those tax strategies.

Counsel noted that the petitioner had not provided its fiscal year 2001 return, and stated that the petitioner's owner was unable to locate it. Counsel stated that was the reason the petitioner's owner's 2001 tax return was not provided.

As further evidence of the petitioner's ability to pay the proffered wage during its 2001 fiscal year counsel cites the petitioner's beginning of fiscal year 2002 retained earnings, which counsel characterized as available funds. Counsel also cited retained earnings as an index of the petitioner's ability to pay the proffered wage during other years.

Counsel noted that the decision of denial stated that the 2003 tax return shows "a negative balance of current assets vs. current liabilities." Counsel responded that assets and liabilities necessarily balance in a double-entry accounting system.<sup>4</sup> Counsel is confusing current assets with total assets and current liabilities with total liabilities. The difference between those terms is explained below, as is why net current assets, rather than total assets, are considered an index of a petitioner's ability to pay additional wages.

As to the 2005 return counsel noted that when the petitioner elected S-corporation status its retained earnings became additional paid-in capital. Counsel argued that the petitioner's additional paid in capital was also a fund available during that year to pay additional wages, characterizing it as "ready cash."

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<sup>3</sup> In the case of a Subchapter S corporation or other entity reporting on a Form 1120S, U.S. Income Tax Return for an S Corporation, Schedule K, Line 17e Income/loss reconciliation is considered to be net income for the purpose of determining whether a petitioner has demonstrated its ability to pay the proffered wage during a given year.

<sup>4</sup> Counsel is at least technically incorrect. An entity's assets need not necessarily equal its liabilities, and, in fact, generally do not. Rather, the debit and credit side of a double-entry accounting system must balance. The credit side includes owner's equity, which is not a liability. None of those distinctions, however, are relevant to the director's comparison of "current assets" and "current liabilities," which terms have meanings different from "assets" and "liabilities."

As to 2006 counsel cited the petitioner's unaudited financial statement as evidence of its ability to pay the proffered wage.

In his argument counsel cited a non-precedent case of this office. Although 8 C.F.R. § 103.3(c) provides that Citizenship and Immigration Services (CIS) precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

The petitioner appears to have been a corporation at all salient times. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. For this reason, the petitioner's owner's personal tax return cannot be used to show the petitioner's ability to pay the proffered wage, and is of no direct relevance to any material issue in this case.

Counsel's reliance on the unaudited financial statement in the record is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statement submitted will not be considered.

Counsel's reliance on the bank statements in this case is similarly 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.<sup>5</sup>

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<sup>5</sup> 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

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.

Gross profit is not, in itself, an indication of a petitioner's ability to pay the proffered wage. Showing that they exceeded the proffered wage, or greatly exceeded it, is insufficient. Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages.

Counsel is correct that the petitioner's gross profit has steadily increased. From the petitioner's 2002 fiscal year to its 2003 fiscal year it rose from \$904,453 to \$961,373, a modest 6% increase. During that same period, however, the petitioner's taxable income before net operating loss deduction and special deductions, which is analogous to net income, fell from over \$100,000 to zero.

From its 2003 fiscal year to its 2004 fiscal year the petitioner's gross profit rose an additional 5% to \$1,008,196. The petitioner's taxable income before net operating loss deduction and special deductions remained low, however, at \$4,503.

The rises in the petitioner's gross profit in the past has not resulted in increased profitability. This office perceives no reason, and counsel provides none, to believe that, even if the moderate increase in the petitioner's gross profit continues in the future, it will result in increased profits, or any profits at all.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are typically last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because, notwithstanding counsel's mischaracterization of them as ready cash, they typically do not represent funds available for disposition. The amount shown as retained earnings is the sum of net earnings and losses from prior years, less any dividends paid to owners. While it represents equity in the assets of the company, it does not represent equity in any one particular asset or another -- current or non-current, cash or non-cash. It may or may not represent equity in assets of a type readily available to the employer to pay wages to its employees while continuing in business. It is not, therefore, an index of a company's ability to pay additional wages.

Additional paid in capital is not a fund available to pay the proffered wage for that same reason. It may or may not have been in cash when paid in. They may or may not now be in cash or in some other liquid form. They may or may not, therefore, be readily available to the petitioner to pay additional wages.

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case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel asserts that the petitioner's tax returns do not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, Federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient 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 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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 did not establish that it employed and paid the beneficiary.

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 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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the

beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>6</sup> shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$20,987.20. The priority date is April 25, 2001. That date fell within the petitioner's 2001 fiscal year, which ran from April 1, 2001 to March 31, 2003, assuming that the petitioner's tax reporting period did not change prior to the 2002 fiscal year. The record contains no reliable evidence pertinent to the petitioner's ability to pay the proffered wage during that 2001 fiscal year. **The petitioner has not demonstrated its ability to pay the proffered wage during its 2001 fiscal year.**

During its 2002 fiscal year, which ran from April 1, 2002 to March 31, 2003, the petitioner declared taxable income before net operating loss deduction and special deductions of \$100,816. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 fiscal year, which ran from April 1, 2003 to March 31, 2004, the petitioner declared taxable income before net operating loss deduction and special deductions of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2003 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during its 2003 fiscal year.

During its 2004 fiscal year, which ran from April 1, 2004 to March 31, 2005, the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,503. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal during

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<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

its 2004 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during its 2004 fiscal year.

The petitioner is obliged to show the ability to pay a *pro rata* share of the proffered wage during its nominal 2005 tax reporting period, which ran from April 1, 2005 through December 31, 2005. Because that period consists of nine months, rather than 12, the petitioner is obliged to show the ability to pay \$15,740.40<sup>7</sup> during that period. During that irregular period the petitioner declared net income of \$13,678. That amount is insufficient to pay the *pro rata* portion of the proffered wage. At the end of that period the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that period. The petitioner has submitted no reliable evidence of any other funds available to it during that period with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the period from April 1, 2005 to December 31, 2005.

The petition in this matter was submitted on February 14, 2006. On that date the petitioner's 2006 tax return was unavailable. On May 5, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. CIS received counsel's response to that request on July 31, 2006, and the record is deemed to have closed on that date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2001, 2003, and 2004 fiscal years, and failed to show that it was able to pay the proffered wage during its irregular tax-reporting period that ran from April 1, 2005 to December 31, 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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<sup>7</sup> \$20,987.20 x  $\frac{3}{4}$ .