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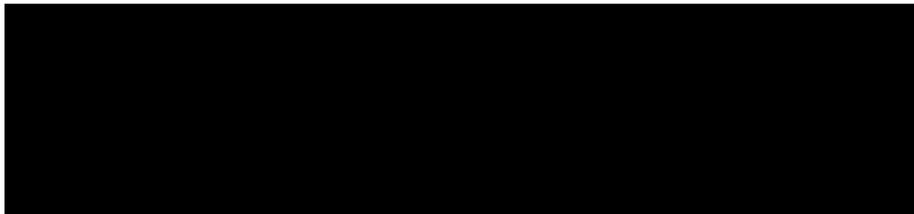
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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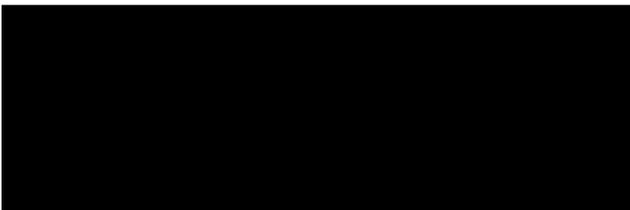
Petitioner:

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 Acting Director, Nebraska Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile transmission repair shop. It seeks to employ the beneficiary permanently in the United States as a garage 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 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. 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.

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.

8 C.F.R. § 204.5(l)(3)(ii)(A) states that,

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.

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.¹ *Matter of Wing's Tea House*, 16 I&N Dec.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration

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 30, 2001. The labor certification states that the position requires four years of experience as an automatic transmission mechanic.

The Form I-140 petition in this matter was submitted on June 30, 2005. On the Form ETA 750, Part B, signed by the beneficiary on April 30, 2001, the beneficiary claimed to have worked (1) as a mechanic for C&P Auto Repair in Fontana, California from February 1993 to February 1994, (2) as an "In Line Mechanic" for Import Auto Clinic in Riverside, California from March 1994 to June 1998, (3) as an "In Line Mechanic" for Tanner Transmission in Ogden, Utah from September 1998 through March 1999, and (4) as an "In Line Mechanic" for the petitioner beginning in March 1999 and continuing to the date he signed that form.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification" The beneficiary listed no other qualifying experience on that form.

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).²

In the instant case the record contains (1) an affidavit dated June 29, 2005 from the beneficiary, (2) a 1994 Form 1099 Miscellaneous Income statement issued by Import Auto Clinic and Machine Shop to the beneficiary, (3) 2001, 2002, 2003, and 2004 Forms W-2 Wage and Tax Statements, (4) invoices for automobile repairs, and (5) a letter dated November 8, 2005 from the petitioner's owner/manager. The record does not contain any other evidence relevant to the beneficiary's qualifying employment experience.

In his June 29, 2005 affidavit the beneficiary attested to the employment for C&P Auto Repair, Import Auto Clinic, and Tanner Transmission that he had previously claimed on the Form ETA 750B. He claimed to have repaired various vehicles at Import Auto Clinic and to have repaired and replaced transmissions for Tanner Transmission. He stated that he has more than ten years of experience as an automatic transmission mechanic.

Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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 1994 Form 1099 shows that during that year Import Auto Clinic and Machine Shop paid the beneficiary nonemployee compensation of \$14,800.

The 2001, 2002, 2003, and 2004 Forms W-2 show that the petitioner employed the beneficiary during those years. This office notes that, as the priority date of the visa petition is April 30, 2001, only the 2001 Form W-2 could indicate any qualifying employment before the priority date.

The automobile repair invoices appear to show payments to "Jose" for automobile repairs pursuant to flat-rate, a type of commission system. Although the recipient is not otherwise identified, this office finds that he is the instant beneficiary, [REDACTED]. Although the employer is not identified, this office notes that the payments were made during the time when the beneficiary claims to have been working for Import Auto Clinic in Riverside, California. The documents were apparently submitted to support that employment claim.

The various automotive repairs listed on those invoices, however, although they document some transmission removals and replacements, transmission seal and gasket replacements, transmission adjustments, and other transmission services, contain no evidence of actual automatic transmission repair. Further, the overwhelming majority of the repairs listed on those invoices are entirely unrelated to automatic transmissions.

In his November 8, 2005 letter the petitioner's owner/manager restated the beneficiary's claims of qualifying employment and indicated that he had been unable to obtain employment verification letters attesting to the beneficiary's previous employment.

The acting director denied the petition on March 27, 2006. On appeal, counsel asserted,

Notwithstanding the conclusions reached in the Decision, the beneficiary possesses the required credentials for the position that is the subject of this petition. Evidence of those credentials has already been submitted. Additional evidence of the beneficiary's credentials is being submitted herewith. As the beneficiary is able, he will submit additional evidence of his credentials. In light of this additional evidence, the Decision should be (i) reconsidered or (ii) overturned.

Additional copies of evidence previously submitted were provided with the appeal, but no new evidence was submitted. On the appeal counsel indicated that he would provide additional evidence or a brief within 30 days. No additional submissions were subsequently received.

On July 10, 2007 this office sent counsel a facsimile transmission asking whether he had submitted any such additional information, argument, or documentation. Counsel did not respond to that facsimile. The appeal will be adjudicated based on the evidence in the record as now constituted.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), set out above, requires that, as verification of the beneficiary's qualifying employment the petitioner provide employment verification letters from the beneficiary's former employers. The attestation from the beneficiary and the letter from the petitioner's owner are insufficient substitutes for the evidence required by the governing regulation and do not demonstrate that the beneficiary is qualified for the proffered position.

The 1994 Form 1099 does not, of course, specify the nature of the beneficiary's employment during that year. The repair invoices tend to support that the beneficiary repaired automobiles for Import Auto Clinic from 1994 to 1998 as claimed. They do not support, however, that he was a transmission mechanic. The Form ETA 750 specifically states that the proffered position requires four years of experience as a transmission mechanic. Those invoices tend to show that the petitioner's employment for Import Auto Clinic was not qualifying employment.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite four years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this ground, which has not been overcome on appeal.

Beyond the decision of the director, the petitioner has not established its ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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 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, as was noted above, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24.29 per hour, which equals \$50,523.20 per year.

On the petition, the petitioner stated that it was established on August 21, 1961 and that it employs six workers. The petition states that the petitioner's gross annual income is \$380,327.77. The space reserved for the petitioner to report its net annual income was left blank.

In the instant case the record contains, (1) the petitioner's 2001, 2002, 2003 and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) the petitioner's unaudited balance sheets as of September 30, 2004 and April 30, 2005, (3) the petitioner's unaudited profit and loss statements for October 2003 through September 2004, and October 2004 through April 2005, and (4) the Form W-2 Wage and Tax Statements previously

noted. 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.³

The petitioner's tax returns show that it is a corporation, that it incorporated on August 21, 1961, and that it reports taxes pursuant to accrual convention accounting and a fiscal year that runs from October 1 of the nominal year to September 30 of the following year.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner reported a loss of \$34,930 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$96,761 and current liabilities of \$38,982, which yields net current assets of \$57,559.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner reported a loss of \$57,887 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$56,404 and current liabilities of \$38,261, which yields net current assets of \$18,143.

During its 2003 fiscal year, which ran from October 1, 2003 to September 30, 2004, the petitioner reported a loss of \$1,557 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$93,578 and current liabilities of \$59,057, which yields net current assets of \$34,521.

During its 2004 fiscal year, which ran from October 1, 2004 to September 30, 2005, the petitioner reported a loss of \$17,785 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L recorded no current assets or current liabilities at the end of that year, which yields net current assets of \$0.

The Forms W-2 submitted show that the petitioner paid the beneficiary \$26,427.17, \$23,312.98, \$15,538.94, and \$19,358.92 during 2001, 2002, 2003, and 2004, respectively.

Counsel's reliance on unaudited financial records 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 merely 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 statements will not be considered.

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

³ As was noted above, the record does contain automotive repair invoices showing payments to the beneficiary during the years he worked for Import Auto Clinic. Because this office finds that the amounts shown as having been paid to the beneficiary were not paid by the petitioner, this office finds that they are irrelevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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. 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 established that it paid the beneficiary \$26,427.17 during 2001, \$23,312.98 during 2002, \$15,538.94 during 2003, and \$19,358.92 during 2004. All of those amounts are less than the annual amount of the proffered wage. The petitioner must show the ability to pay the balance of the proffered wage.

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 typically⁴ 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 \$50,523.20 per year. The priority date is April 30, 2001.

Analysis of the petitioner's ability to pay the proffered wage during the salient years is complicated by the fact that the petitioner reports taxes pursuant to a fiscal year running from October 1 to September 30, whereas wages are recorded on W-2 forms pursuant to the calendar year. For the purpose of determining the petitioner's ability to pay the proffered wage during the salient years this office shall assume that the petitioner's payments to the beneficiary were essentially level during each of those years. That is, this office will assume that, of the amount paid during 2001, for instance, three quarters was paid prior to October 1, during the petitioner's 2000 fiscal year, and the remaining one-quarter was paid on or after October 1, during the petitioner's 2001 fiscal year.

The petitioner has demonstrated that it paid the beneficiary \$19,820.37⁵ during its 2000 fiscal year. That amount is less than the annual amount of the proffered wage. The petitioner did not provide its fiscal year 2000 tax return or any other additional evidence pertinent to the period between the April 30, 2001 priority date and the end of the 2000 fiscal year on September 30, 2001. Therefore the petitioner has not demonstrated the ability to pay the proffered wage during the period from the priority date to the end of its 2000 fiscal year.

The petitioner has demonstrated that it paid the beneficiary \$24,091.53 during its 2001 fiscal year⁶, and must show the ability to pay the remaining \$26,431.67 during that fiscal year. During its 2001 fiscal year the petitioner declared a loss. 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 fiscal year the petitioner had \$57,559 in net current assets. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁵ That is, three-quarters of the \$26,427.17 it paid to him during the 2001 calendar year, which equals \$19,820.37.

⁶ That is, the sum of one-quarter of the amount it paid him during the 2001 calendar year, or \$6,606.79, plus three-quarters of the amount it paid to him during the 2002 calendar year, or \$17,484.74.

The petitioner has demonstrated that it paid the beneficiary \$17,482.45 during its 2002 fiscal year⁷, and must show the ability to pay the remaining \$33,040.75 during that fiscal year. During its 2002 fiscal year the petitioner declared a loss. 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 fiscal year the petitioner had \$18,143 in net current assets. That amount is insufficient to pay the remaining balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

The petitioner has demonstrated that it paid the beneficiary \$18,403.92 during its 2003 fiscal year⁸, and must show the ability to pay the remaining \$32,119.28 during that fiscal year. During its 2003 fiscal year the petitioner declared a loss. 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 fiscal year the petitioner had \$34,521 in net current assets. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

The petitioner has demonstrated that it paid the beneficiary \$4,839.73 during its 2004 fiscal year.⁹ The petitioner is obliged to show the ability to pay the remaining \$45,683.47 balance of the proffered wage during that fiscal year. During its 2004 fiscal year the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The petitioner reported no net current assets at the end of that fiscal year. 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 has submitted no reliable evidence of any other funds available to it during its 2004 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on June 30, 2005. On that date the petitioner's fiscal year 2005 tax return was unavailable. On August 17, 2005 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. On that date the petitioner's 2005 tax return was still unavailable.¹⁰ For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during its 2005 fiscal year and later fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2000, 2002, and 2004 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The visa petition should have been denied for this additional reason.

⁷ That is, the sum of one-quarter of the amount it paid him during the 2002 calendar year, or \$5,828.24, plus three-quarters of the amount it paid to him during the 2003 calendar year, or \$11,654.21.

⁸ That is, the sum of one-quarter of the wages it paid him during the 2003 calendar year, or \$3,884.73, plus three-quarters of the amount it paid to him during the 2004 calendar year, or \$14,519.19.

⁹ That is, one-quarter of the wages it paid him during the 2004 calendar year.

¹⁰ In fact, the petitioner's 2005 fiscal year would not commence until October 1, 2005.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹¹ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹¹ This office also observes that a website operated by the Utah Department of Commerce <<https://secure.utah.gov/bes/action/index>> indicates that the petitioner's corporate status in Utah has expired. Although this forms no part of the basis of today's decision, if the petitioner attempts to overcome today's decision it should demonstrate that is a corporation in good standing.