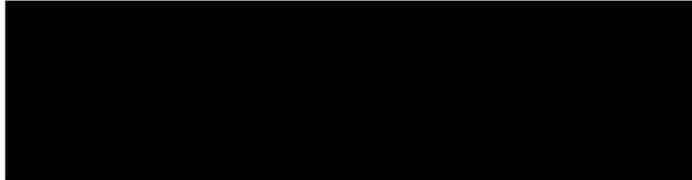


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

SEP 20 2007

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

EAC 06 069 50434

IN RE:

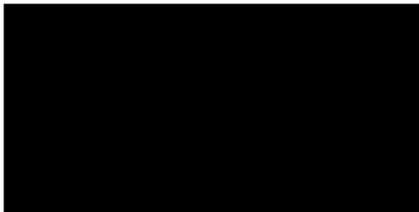
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's July 7, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date 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). The priority date in the instant

petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$17.75 per hour or \$36,920 annually.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a copy of the 2002 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business, for the petitioner's owner, a copy of the 2004 and 2005 Form 1120, U.S. Corporation Income Tax Returns, for Latin Beauty Salon II, Inc., a copy of a 2004 Form 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, copies of the petitioner's owner's 2004 and 2005 Forms 1040, a copy of the petitioner's 2005 Form 1120, and copies of the petitioner's bank statements for 2005 and 2006 through June of 2006.² Other relevant evidence includes copies of the petitioner's 2002 through 2004 Forms 1120, copies of the beneficiary's 2001 through 2004 Forms 1099-MISC, a copy of the beneficiary's 2002 Form W-2, Wage and Tax Statement, copies of the petitioner's 2002 and 2003 Forms W-3, Transmittal of Wage and Tax Statements, a copy of a 2001 combined tax statement showing five retail loans with accompanying interest for the petitioner's owner, and a copy of the petitioner's 2001 Form 1040. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 and 2002 Forms 1040 reflect adjusted gross incomes of \$68,541 in 2001 and \$60,990 in 2002.³

The petitioner's 2002 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of -\$623, \$3,139, \$7,121, and \$5,393, respectively. The petitioner's 2002 through 2005 Forms 1120 also reflect net current assets of \$5,142, \$2,474, \$3,377, and \$9,905, respectively.

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

² The petitioner's reliance on the balances in its bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Therefore, the petitioner's bank statements will not be considered when determining the petitioner's ability to pay the proffered wage of \$36,920.

³ It is noted that the petitioner was incorporated on October 21, 2002.

The petitioner's owner's 2004 and 2005 Forms 1040 reflect adjusted gross incomes of \$65,578 in 2004 and \$85,172 in 2005.

The beneficiary's 2001 through 2004 Forms 1099-MISC reflect wages earned by the beneficiary from the petitioner of \$29,406, \$5,288, \$28,928, and \$26,665, respectively. A Form 1099-MISC for 2005 was not submitted.

The beneficiary's 2002 Form W-2 reflects wages earned by the beneficiary from the petitioner of \$552.

The 2004 and 2005 Forms 1120 for the petitioner's owner's business in Fredericksburg, Virginia reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$12,917 in 2004 and \$4,366 in 2005. Those 2004 and 2005 Forms 1120 also reflect net current assets of \$1,280 in 2004 and \$18,656 in 2005.⁴

On appeal, counsel alleges that the petitioner has established its ability to pay the proffered wage of \$36,920 based on its gross profit, net profit, compensation of officers, its Fredericksburg, Virginia business, and its bank statements. Counsel cites a non-precedent AAO decision in support of this contention.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner submitted copies of the beneficiary's 2001 through 2004 Forms 1099-MISC showing that the beneficiary earned wages of \$29,406, \$5,288, \$28,928, and \$26,665, respectively, in those years. The petitioner also submitted a copy of the beneficiary's 2002 Form W-2 showing that the beneficiary earned additional wages of \$552 in 2002. Therefore, the petitioner has established that it employed the beneficiary in the years 2001 through 2004.

The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$36,920 and the actual wages paid to the beneficiary. In this case, those differences for the years 2001 through 2004 would be \$7,514, \$31,080, \$7,992, and \$10,255, respectively. The petitioner did not submit a Form 1099-MISC or Form W-2 on behalf of the beneficiary for 2005. Therefore, CIS cannot ascertain the difference between the proffered wage of \$36,920 and the actual wages paid to the beneficiary in 2005.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of

⁴ Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the income from the petitioner's owner's business in Fredericksburg, Virginia will not be considered when determining the petitioner's ability to pay the proffered wage of \$36,920.

depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2002 through 2005 were -\$623, \$3,139, \$7,121, and \$5,393, respectively. The petitioner could not have paid the difference of \$31,080 between the proffered wage of \$36,920 and the actual wages paid to the beneficiary of \$5,840 from its net income of -\$623 in 2002. The petitioner could not have paid the difference of \$7,992 between the proffered wage of \$36,920 and the actual wages paid to the beneficiary of \$28,928 from its net income of \$3,139 in 2003. The petitioner could not have paid the difference of \$10,255 between the proffered wage of \$36,920 and the actual wages paid to the beneficiary of \$26,665 from its net income of \$7,121 in 2004. The petitioner failed to submit a Form 1099-MISC or Form W-2 on behalf of the beneficiary for 2005. Therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference between the proffered wage of \$36,920 and the actual wages paid to the beneficiary from its net income of \$5,393 in 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2002 through 2005 tax returns reflect net current assets of \$5,142, \$2,474, \$3,377 and \$9,905, respectively. The petitioner could not have paid the difference of \$31,080 between the proffered wage of \$36,920 and the actual wages paid to the beneficiary of \$5,840 from its net current assets of \$5,142 in 2002. The petitioner could not have paid the difference of \$7,992 between the proffered wage of \$36,920 and the actual wages paid to the beneficiary of \$28,928 from its net current assets of \$2,474 in 2003. The petitioner could not have paid the difference of \$10,255 between the proffered wage of \$36,920 and the actual wages paid to the beneficiary of \$26,665 from its net current assets in 2004. As the petitioner failed to submit any Forms 1099-MISC. or Forms W-2 on behalf of the beneficiary in 2005, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference between the proffered wage of \$36,920 and the actual wages paid to the beneficiary from its net current assets in 2005.

In 2001 and part of 2002, the petitioner was a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of two in 2001 and a family of three in 2002. In 2001 and 2002, the sole proprietor's adjusted gross incomes were \$68,541 in 2001 and \$60,999 in 2002.⁶ However, although not requested by the director, the record of proceeding does not contain a list of the sole proprietor's personal monthly recurring expenses, and, therefore, the AAO cannot determine if the

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

⁶ The acting director determined that the petitioner has established its ability to pay the proffered wage as of the priority date of April 27, 2001, but that it has failed to establish its continuing ability to pay the proffered wage since that time.

sole proprietor had sufficient funds to support its family of two in 2001 and three in 2002 after paying the proffered wage of \$36,920.⁷

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$36,920 based on its gross profit, net profit, compensation of officers, its Fredericksburg, Virginia business, and its bank statements. Counsel cites a non-precedent AAO decision in support of this contention. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

On appeal, counsel also alleges that the income from the petitioner's owner's business in Fredericksburg, Virginia could be used to pay the proffered wage of \$36,920. However, again, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. The petitioner's owner's business in Fredericksburg, Virginia cannot be used as a source for paying the proffered wage of \$36,920 to the beneficiary.

Counsel further claims that the petitioner has established its ability to pay the proffered wage based on its gross profit and net profit. However, CIS will not consider the petitioner's gross profit and net profit without also considering the petitioner's liabilities. CIS will consider the wages paid to the beneficiary in each of the pertinent years, the petitioner's net incomes, and the petitioner's net current assets as means of determining the petitioner's ability to pay the proffered wage.

Counsel points to the petitioner's compensation of officers and states that it could be used to pay the proffered wage to the beneficiary. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120, U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, in the instant case, counsel has provided no verifiable evidence or notarized affidavit from the owners of the petitioner confirming that they would be

⁷ The AAO does not concur with the director has established its ability to pay the proffered wage of \$36,920 as of the priority date. The petitioner's schedule A of the 2001 1040 tax return shows that the sole proprietor paid medical and dental expenses of \$3,748, paid taxes of \$3,774, and paid home mortgage interest and points of \$20,898, totaling \$29,484 in deductions in the year of 2001. It is noted that the actual living expenses would be more than this amount. After deducting these expenses and the beneficiary's proffered wage from the adjusted gross income, the sole proprietor would have had a remainder of \$2,137 to pay his utilities, food, etc. in 2001. In addition, the petitioner's schedule A of the 2002 1040 tax return shows that the sole proprietor paid medical and dental expenses of \$12,121, paid taxes of \$5,953, paid home mortgage interest and points of \$17,098, and paid to gifts to charity of \$250, totaling \$30,848 in deductions in 2002. After deducting the beneficiary's proffered wage from the adjusted gross income, the sole proprietor would not have had a remainder sufficient enough to pay to pay all of his expenses.

willing or able to forego their compensation in order to pay the proffered wages to the beneficiary. Furthermore, the petitioner has four owners, all with equal shares, and in order to use the officer compensation, the petitioner would need to provide notarized affidavits or verifiable evidence for all owners receiving officer compensation confirming they would be able to forego their compensation in order to pay the proffered wages to the beneficiary.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not submitted the sole proprietor's monthly household expenses in order that a determination can be made regarding the sole proprietor's ability to pay the proffered wage and to support a family of two in 2001 and a family of three in 2002. In addition, none of the remaining tax returns for 2002 through 2005 establish the petitioner's ability to pay the proffered wage, and none of these returns establish that the business has met all of its obligations in the past or establish its historical growth.⁸ Furthermore, there is no evidence of the petitioner's reputation throughout the industry, or that the petitioner incurred any uncharacteristic business expenses or losses in any relevant year.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

⁸ It is noted that the petitioner's gross receipts decreased from \$283,323 in 2004 to \$236,409 in 2005.

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.