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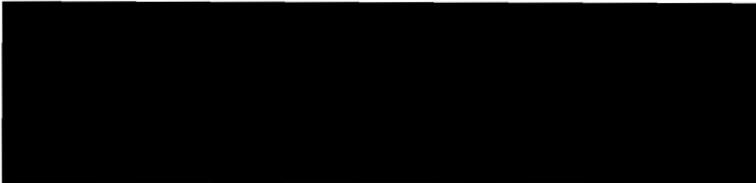
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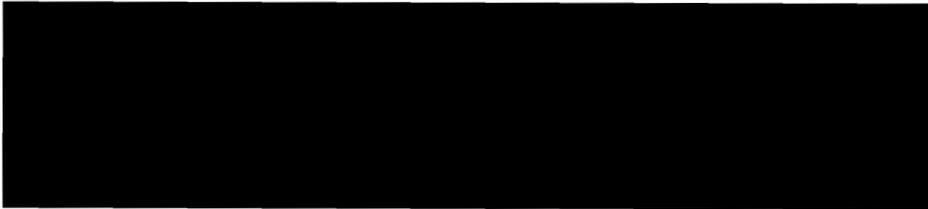


FILE: EAC 06 072 52317 Office: NEBRASKA SERVICE CENTER Date: **APR 07 2008**

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:



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 preference visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is healthcare.¹ It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). 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. The acting director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's denial dated September 19, 2006, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(i) of 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.

On May 4, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- 2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

¹ According to a letter from the petitioner dated December 22, 2005, the petitioner is a management consulting and healthcare recruitment firm.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or December 28, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$16.69 an hour or \$34,715.20 annually.

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 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 appeal.²

Relevant evidence in the record includes copies of the following documents: letters from the petitioner dated December 15, 2005 and December 22, 2005; letters from counsel dated February 7, 2006, July 20, 2006 and October 19, 2006; the ETA Form 9089 signed by the petitioner on December 19, 2005; an undated memorandum concerning a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, and the petitioner's financial statements; the subject CIS Interoffice Memorandum (HQOPRD 90/16.45); three case precedents concerning the petitioner's ability to pay the proffered wage; a prevailing wage determination from the New York State Department of Labor for the job of registered nurse at the prevailing wage rate of \$16.69 with the determination date of December 2, 2005; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns³ for 1999, 2000, 2001, 2003, 2004 and 2005; the petitioner's financial statement for "December 31, 2004 through 2000," and the years ended December 31, 2003 and 2004;⁴ a letter from

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

³ The priority date of the Form ETA 9089 Application for Permanent Employment Certification is December 28, 2005. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

⁴ The petitioner has submitted the compiled statements. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were

petitioner dated April 8, 2004 with compiled financial statements attached for December 31, 2001 and 2002; an undated "Comprehensive Master Services Agreement;" and approximately 25 printed pages from the Democrat and Chronicle of Rochester, New York website accessed February 15, 2006, mentioning the petitioner.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 42 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$170,981.00 and \$5.6 million respectively. On the ETA 9089, signed by the beneficiary on November 11, 2004, the beneficiary did not claim to have worked for the petitioner.

Counsel has requested oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. §103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Upon appeal, counsel submits a legal brief no additional evidence.

On appeal, counsel asserts that the director does not rely on "the full body of case law from superior courts." Counsel states that CIS "cannot pick and choose which federal case opinions that it wishes to accept and reject." Counsel has submitted case precedents in this matter which are *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977) and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), On this issue the regulation at 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. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). The above cited decisions are precedent decisions which are followed by CIS and/or the AAO.

Counsel has submitted case precedents in this matter which are *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), and *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As found below, the AAO has followed these two cases cited by counsel in this discussion.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification 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

produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. The petitioner's Form 1120S⁵ tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2005, the Form 1120S stated a loss (Schedule K, line 17.e) of <\$216,807.00>⁶.

Since the proffered wage is \$34,715.20 per year, the petitioner did not have sufficient net income to pay the proffered wage the proffered wage for year 2005.

⁵ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

If the net income the petitioner demonstrates it had available during the 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets were <\$493,505.00> in 2004.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Counsel asserts in statements made in these proceedings and in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁸ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Counsel contends that *Masonry Masters, Inc.* demands that the director "look to the marginal contribution to the value of the company's production an addition [sic] employee will add to its net income." Counsel contends that with the permanent employment of the beneficiary as a registered nurse, its business income will increase because the difference between what it will pay the beneficiary, and what it will receive from its customer for her services, is large. Therefore, counsel contends that the petitioner's profit margin from this business model will be large. The assertions of the counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although part of the decision of *Masonry Masters, Inc.* mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. The acting director in his decision discussed the practicalities of the petitioner's business, which is to provide temporary workers on a continuing basis with employers who may utilize their services on a temporary contractual basis or elect to hire them permanently. Although counsel stated that the hourly rate at which these workers are placed by the petitioner is under the hourly rate paid by the third-party employer to the petitioner that in itself is not the only indicator of a viable business enterprise. No detail or documentation has been provided by the petitioner to explain how the

⁷ 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.

⁸ 8 C.F.R. § 204.5(g)(2).

beneficiary's employment as a registered nurse will significantly increase petitioner's profits. The acting director pointed out that counsel failed to also set forth "any of the additional costs to the petitioner for the beneficiary's employment."

According to the undated "Comprehensive Master Services Agreement;" submitted into evidence, the beneficiary would be one of the petitioner's permanent employees that are employed in a series of temporary jobs in many locations according to the needs of the petitioner's customers. It is now a common industry practice for employers to limit a temporary worker's assignment to a limited number of months to prevent the imposition of the payment of certain benefits required to be paid long-term temporary and contract workers, for example, stock options, to provide non-discriminatory treatment between its regular employee and the long term temporary workers. See *Vizcaino v. Microsoft Corp.*, 173 F.3d 713, 723-24 (9th Cir. 1999). This necessitates an employer such as the petitioner to replace their workers in as little as nine months on assignment. This necessity may lead to significant disruption of revenue and is a factor that may reduce the petitioner's profit margin. It and other off-setting expenses were not discussed by counsel. The acting director has considered according to the record of proceeding all pertinent evidence in the record. Similarly, the AAO has also considered relevant evidence submitted on appeal.

We note that in 2005 the petitioner suffered a loss of <\$216,807.00>. This loss was not explained by the petitioner nor did the petitioner explain what portion of the petitioner's total business revenues or losses were attributable to the placement of registered nurses such as the beneficiary.

Proof of ability to pay begins on the priority date that is December 28, 2005 when petitioner's petition was accepted for processing by CIS. The petitioner's net income, current assets and financial status is examined from the priority date. It is not examined contingent upon some event in the future. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel throughout the case refers to financial evidence, tax returns and compiled financial statements submitted for time periods prior to the priority date of December 28, 2005. The regulation at 8 C.F.R. § 204.5(d) states in pertinent part that "... The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service." In this case the priority date was December 28, 2005. As already stated, tax returns and other financial evidence submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

Counsel asserts the case precedent of *Matter of Sonogawa*, 12 I&N Dec. at 612, lends support to his contention that the "petitioner's sound business reputation and outstanding reputation must be considered when assessing a Petitioner's ability to pay." In furtherance of his contention, counsel has submitted approximately 25 printed pages from the Democrat and Chronicle of Rochester, New York website accessed February 15, 2006, mentioning the petitioner. In one of the publications the petitioner is a listed business among 99 other companies. The second article dated November 9, 2003, mentions the petitioner as a business in the writer's "Top 100" and states the petitioner "is using its recruitment background to establish a new

independent company that will recruit nurses and other medical staff from overseas.” According to counsel, the petitioner provides staff to TLC Health Network, Irving New York.

A quote in the article from _____ the petitioner’s chief executive officer, referring to the company’s new nurse/medical staff endeavor states in the article “this will help us until the utility industry turns around.” According to the article the petitioner “advises utilities and energy companies on technology for customer service systems” and provides other services. This information and the 2005 tax return do not demonstrate a viable profitable business enterprise capable of paying the proffered wage from the priority date and continuing into the present.

Matter of Sonogawa, Id. relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

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.

According to the petition, the business was established in 1999, and, at the time of the preparation of the petition, employed 42 individuals. The gross annual income stated on the petition was \$5.6 million. In 2005, the Form 1120S stated a loss (Schedule K, line 17.e) of <\$216,807.00>. There is no information in the record of proceeding concerning this loss other than that the petitioner’s principle business is servicing utility customers, that this business had been in decline, and that an article dated November 9, 2003, by counsel states the petitioner “is using its recruitment background to establish a new independent company that will recruit nurses and other medical staff from overseas.” Therefore it appears that the petitioner’s business venture in the healthcare sector is relatively recent. Information concerning the above factors, at least on a historical basis is unavailable. According to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner’s ability to pay is determined. Counsel has only submitted one federal tax return, and no other independent, objective and probative evidence. The AAO is unable because of the paucity of data submitted to determine the historical growth of the petitioner’s business.

⁹ 8 C.F.R. § 204.5(g)(2).

According to counsel, the petitioner has over \$600,000.00 in retained earnings to utilize as extra cash. According to Schedule L of the petitioner's 2005 federal tax return at year's end the petitioner stated <\$342,236.00> in retained earnings.¹⁰ Therefore counsel's assertion is erroneous.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2005 was an uncharacteristically unprofitable year for the petitioner.

Beyond the decision of the director, CIS electronic database records show that the petitioner filed I-140 petitions on behalf of 99 other beneficiaries at about the same time as the instant petition was filed. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 5-50B job offer, the predecessor to the Form ETA 750 and Form 9089). See also 8 C.F.R. § 204.5(g)(2).

The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

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.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

¹⁰ 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 to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

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

ORDER: The appeal is dismissed.