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U.S. Citizenship and Immigration Services

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JUN 14 2007

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 03 030 55527

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal 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 director's original October 24, 2005 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.

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 CFR § 204.5(d). The priority date in the instant petition is March 21, 2001. The proffered wage as stated on the Form ETA 750 is $16.00 per hour or $33,280 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence submitted on appeal includes counsel's brief, an affidavit from [redacted] dated November 14, 2005, and previously submitted documentation, which includes a case status update from CIS, dated October 22, 2005, a copy of a fax transmittal to the Texas Service Center, dated, October 22, 2005, a copy of a fax transmittal from the Postal Service, dated October 22, 2005, with regard to delivery information, a copy of counsel's response, dated October 15, 2005, to the director's notice of intent to deny (NOID), dated September 19, 2005, copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, for the years 2003 and 2004, a copy of letter, dated October 2005, from [redacted] Certified Public Accountant (CPA) with one of the partner's, [redacted], personal financial statement, dated October 4, 2005, and a copy of the petitioner's financial statements for the year ended July 31, 2005. Other relevant evidence includes copies of the petitioner's 2002 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and a copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 through 2004 Forms 1120S reflect ordinary incomes or net incomes of $8,514, -$8,586, and $1024, respectively.[2] The petitioner's 2002 through 2004 Forms 1120S also reflect net current assets of $24,558, $25,751, and $6,893, respectively.

The petitioner's 2001 Form 1065 reflects an ordinary income or net income from Schedule K of $64,502 and net current assets of $50,158.

The beneficiary's 2003 and 2004 Forms W-2 reflect wages earned from the petitioner of $2,250 and $7,750, respectively.

The petitioner's compiled financial statement for the year ending July 31, 2005 reflects total income of $208,699.13, gross profit of $136,457.42, net income of $39,430.97, and net current assets of $12,300.71.[3]

The partner's, [redacted], personal financial statement, dated October 4, 2005, reflects net current assets of $852,000.

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[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] It is noted that Schedule K was not submitted with the 2002 through 2004 Forms 1120S.

[3] 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 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.

The affidavit fro states that she works as a rental agent and executive secretary for [redacted] at [redacted], Sarasota, Florida 34236 and that counsel has been a tenant in the Suites since 1997, specializing in Immigration Law. Ms. [redacted] also states that on October 14, 2005, counsel requested that she prepare a U.S. Postal Service Express Mail package for overnight delivery by October 19, 2005 to CIS at the Texas Service Center in Mesquite, Texas for his client [redacted]. Ms. [redacted] prepared air-bill number [redacted] US, and the return copy of the air-bill, dated October 17, 2005, was given to counsel that same day. copy of the air-bill is attached.

The case status report, dated October 22, 2005, states that the petitioner's case normally takes between 400 and 450 days; however, because preliminary processing was complete, the remaining processing time will be less than the maximum stated.

The fax transmittal from counsel to the Texas Service Center indicated that he was faxing five pages of information regarding the director's NOID, that includes copies of the beneficiary's 2003 and 2004 Forms W-2, a letter dated October 9, 2005, from the petitioner's CPA describing the "interests of [redacted] in employer, [redacted], as 50% shareholder, holding the offices of VP, Treasurer, and Director, the addition of a new store which was a factor in a higher net profit of $39,430 as of 7/31/05. *See* Financial Statements for Seven Months Ended 07/31/05," the notarized personal financial statement of [redacted], and counsel's assertions. Counsel claims that in 2003 and 2004, there was a downturn in the petitioner's business that resulted in virtually no corporate net income. However, from January 2005, "owing to the expansion of the company with a new store, the net income rose to $39,430, projecting out to $67,594 net income on projected sales of $357,769, end of year." *See* CPA Letter. Counsel further states that "We submit therefore, that the wages of $33,280 per year for 2003-2004, and thereafter, is backed by the net worth of [redacted] of $1.5 Million, the projected income from the recent expansion, and the fact that the 140 was approvable when filed. Under these circumstances, the ability of the employer to pay the wages upon approval of the I-140/485 is reasonably assured."

The letter from the petitioner's CPA, dated October 9, 2005, states:

> I have been the accountant for Mr. [redacted] for the past five years. I am familiar with his business books and records and have knowledge of his businesses. Mr [redacted] is a co-owner of a multiple well established businesses [sic] of which have been successful through out the years. For your information [redacted] Inc. has expanded during the current year by adding a new store to its operation. The addition of the new store has already translated into higher profits for the company (see financial statements as of July 31, 2005). Mr. is a 50% shareholder of [redacted] Inc. and holds the titles and functions of Vice President, Treasurer and Director of the corporation. Mr. [redacted] himself is an engineer with Southwest Florida Water Management District. His gross income from all sources shown on his 2003 and 2004 tax returns were approximately $100,000 and $200,000 consecutively.

On appeal, counsel states that the undue delay of almost three years by CIS for a decision on the immigrant petition, forced the petitioner to present its 2003 and 2004 tax returns, which were slow years with a loss of -$8,586 and a net income of $1,024, respectively. Counsel further states that if the petition had been timely processed by CIS, the decision on the immigrant petition would have been approved based on 2001 tax numbers at the time of filing the application for alien labor certification, establishing the ability of petitioner to pay the offered wages, and the petitioner would not have had to submit additional financial documents for 2003 and 2004. Counsel cites *Masonry Masters, Inc. v. Thornburgh,* 875 F2d. 898, (D.C. Cir. May, 1989) in support of his contentions.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 instant case, on the Form ETA 750B, signed by the beneficiary on March 15, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has provided copies of Forms W-2, issued by the petitioner for the beneficiary, for 2003 and 2004. Therefore, the petitioner has established that it employed the beneficiary in some part of 2003 and 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of $33,280 and the actual wages paid of $2,250 and $7,750 to the beneficiary in 2003 and 2004, respectively. Those differences are $31,030 in 2003 and $25,530 in 2004. Since it appears that the petitioner did not employ the beneficiary in 2001 and 2002, the petitioner is obligated to establish that it had sufficient funds to pay the entire proffered wage of $33,280.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.,* the court held that 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. 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." *See also Elatos Restaurant Corp.*, 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

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.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

In the instant case, the petitioner's 2002 through 2004 net incomes (Schedule K was not provided) were $8,514, -$8,586, and $1,024, respectively. The petitioner could not have paid the proffered wage of $33,280 from its net income in 2002, nor could it have paid the difference of $31,030 and $25,530 from its net income in 2003 and 2004, respectively between the proffered wage of $33,280 and the wages paid of $2,250 in 2003 and $7,750 in 2004. However, the petitioner has established that it could have paid the proffered wage of $33,280 in 2001 from its net income (either Line 21 with a net income of $38,102 or Schedule K with a net income of $64,502).

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.[4] 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 net current assets in 2001 through 2004 were $50,158, $24,558, $25,751, and $6,893, respectively. The petitioner could have paid the proffered wage of $33,280 in 2001, but not in 2002 from its net current assets. In addition, the petitioner could not have paid the difference of $31,030 in 2003 or $25,530 in 2004 between the proffered wage of $33,280 and the actual wages paid to the beneficiary of $2,250 in 2003 and $7,750 in 2004 from its net current assets.

On appeal, counsel states that the undue delay of almost three years by CIS for a decision on the immigrant petition, forced the petitioner to present its 2003 and 2004 tax returns, which were slow years with a loss of

[4] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

-$8,586 and a net income of $1,024, respectively. Counsel further states that if the petition had been timely processed by CIS, the decision on the immigrant petition would have been approved based on 2001 tax numbers at the time of filing the application for alien labor certification, establishing the ability of petitioner to pay the offered wages, and the petitioner would not have had to submit additional financial documents for 2003 and 2004. Counsel cites *Masonry Masters, Inc. v. Thornburgh,* 875 F2d. 898, (D.C. Cir. May, 1989) in support of his contentions.

The AAO notes that the priority date is March 21, 2001 and the Department of Labor (DOL) certified the labor certification on September 10, 2002. The petition was filed on November 8, 2002. From the outset, it should be noted that the AAO does not have control of the amount of processing time it takes for DOL to adjudicate a labor certification application or for a service center to adjudicate a petition, and, surely, counsel is not suggesting that when a petition demonstrates ineligibility at the time of filing a petition, no additional documentation should be considered. As the regulations at 8 C.F.R. § 204.5(g)(2) state, "[t]he petitioner must demonstrate this ability [to pay the proffered wage] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." In the instant case, the director was correct in requesting additional documentation regarding the petitioner's continuing ability to pay the proffered wage. Thus, the petitioner has an ongoing obligation to demonstrate its ability to pay the proffered wage.

In addition, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision 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.[5] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a chef will significantly increase profits for this restaurant. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

On appeal, counsel states that the petitioner had a downturn in business in 2003 and 2004 that resulted in virtually no corporate net income. However, counsel has provided no evidence or reasons why the petitioner had such a downturn. The assertions of 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, counsel and the petitioner's CPA also claim that from January 2005, "owing to the expansion of the company with a new store, the net income rose to $39,430, projecting out to $67,594 net income on projected sales of $357,769, end of year." However, there is no evidence of the expansion of a new store such as a purchase agreement, lease, name, corporate filing, taxes, etc. for a new store. Again, *see Matter of Obaigbena,* 19

[5] It should be noted that there is now a formula for determining the petitioner's ability to pay the proffered wage, which was laid out earlier in this decision. That formula includes first determining if the petitioner employed the beneficiary during the pertinent years at a salary equal to or greater than the proffered wage, then CIS considers the net income on the petitioner's tax returns, after which CIS reviews the petitioner's net current assets, and finally, CIS considers the totality of the circumstances affecting the petitioning business, if the evidence warrants such consideration.

I&N at 533, 534, *Matter of Ramirez-Sanchez,* 17 I&N at 503, 506, *Matter of Soffici,* 22 I&N at 158, 165, and *Matter of Treasure Craft of California,* 14 I&N at 190.

Counsel further states that "[w]e submit therefore, that the wages of $33,280 per year for 2003-2004, and thereafter, is backed by the net worth of Samir Chehab of $1.5 Million. However, contrary to counsel's assertion, 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. 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."

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, 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 Sonegawa*, 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, the petitioner's tax returns indicate it was incorporated in 2002, but has been business since 1998. The petitioner has provided tax returns for the years 2001 through 2004. However, only one tax return (2001) establishes the petitioner's ability to pay the proffered wage of $33,280, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. The petitioner's tax returns show that gross receipts have ranged between $100,000 and $300,000, and in some years, the petitioner did not pay out officer's compensation or wages/cost of labor at all, and in other years, it paid out just small amounts. There is also no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petitioner's 2001 tax return reflects an ordinary income or net income of $64,502 from Schedule K and net current assets of $50,158. The petitioner could have paid the proffered wage of $33,280 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of $8,514 (Schedule K was not submitted) and net current assets of $24,558. The petitioner could not have paid the proffered wage of $33,280 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of -$8,586 (Schedule K was not submitted) and net current assets of $25,751. The petitioner could not have paid the difference of $31,030 between the proffered wage of $33,280 and the actual wages of $2,250 paid to the beneficiary from either its net income or net current assets in 2003.

The petitioner's 2004 tax return reflects an ordinary income or net income of $1,024 (Schedule K was not submitted) and net current assets of $6,893. The petitioner could not have paid the difference of $25,530 between the proffered wage of $33,280 and the actual wages paid to the beneficiary of $7,750 from either its net income or its net current assets in 2004.

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

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.