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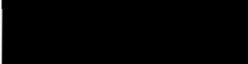
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OCT 24 2008

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Chinese cuisine. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the sole proprietor had sufficient financial resources to pay the beneficiary's proffered wage in the 2001 priority year and in tax year 2002, but that as an S corporation in the tax years 2003, 2004, and 2005, the petitioner did not provide sufficient evidence to establish its ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 11, 2006 decision, the single issue in this case is whether or not the petitioner, as a sole proprietorship or an S corporation, has the continuing ability to pay the proffered wage.¹

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 nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The AAO notes that the director in his decision did not address specifically whether the petitioner as a sole proprietor in tax years 2001 and 2002 had established the ability to pay the proffered wage as well as pay the petitioner's household expenses. Counsel also notes this omission in her comments on appeal. Therefore the AAO will discuss this issue more fully in these proceedings

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$2,105 per month, or \$25,260 per year. The Form ETA 750 states that the position requires two years of training in Hunan food preparation, and four years of work experience as a foreign specialty cook.

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 appeal². On appeal counsel submit a brief and a cover letter dated October 18, 2006 and written by [REDACTED], C.P.A., Monte Vista, Colorado. The cover letter accompanies a compiled financial statement for the petitioner's tax years ending in December 31, 2003, 2004, and 2005, also prepared by Mr. [REDACTED]. The AAO notes that the compiled financial statements appear to consolidate the petitioner's assets, liabilities and equity figures as well as revenues, expenses and retained earnings figures for the petitioner and a second business owned by the petitioner, East-West Grill of Alamosa, for the three tax years.

In his cover letter, [REDACTED] examines items on page four and page five of the combined financial statement. With regard to page four, [REDACTED] notes that the expenses for officer and related party expense were deducted under the item "other Income (Expense)" since these expenses are discretionary by management. Mr. [REDACTED] then notes that payments to the officers, their wives and mother for salaries, wages, employee benefits, and building rent could be reduced to provide cash to pay another employee. With regard to page five, the petitioner's accountant notes that the financial statement show net cash provided by operating activities before deducting depreciation and amortization but after deducting officer and related party expenses and interest expense-related party expenses. The accountant states that his information seemed to indicate that even if there were no change to those expenses, the petitioner generated enough cash from operations to pay another employee in 2004 and 2005. The accountant also notes that the petitioner opened a new business, East-West Grill, in 2003 and stated that this could explain why operating cash was lower in 2003.

With the initial I-140 petition, the petitioner submitted 2001 and 2002 IRS Forms 1040, without the Form 1040 but with various schedules, including the petitioner's Schedules C for tax years 2001 and 2002. These two documents indicated the petitioner had a net profit of \$1,201 in tax year 2001 and a net loss of -\$3,781 in tax year 2002. The petitioner also submitted a document entitled "Transfer of Property to a Controlled Corporation Under Reg. Sec. 1.351-3" that stated listed property transferred to Hsu, Inc. D/B/A Hunan Chinese Restaurant of Alamosa, Employer Identification Number (EIN) [REDACTED]. The date of transfer is identified as January 1, 2003, and the document stated that the liabilities listed were created in the ordinary course of business of the father's predecessor sole-proprietorship doing business as Hunan Chinese Restaurant of Alamosa. The petitioner also submitted a state of Colorado certificate from the Secretary of State that stated the company Hsu, Inc. was in good standing as of its formation on December 24, 2002. The petitioner also submitted its Forms 1120S for tax years 2003 and 2004.

² 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).

The director, in his Request for Evidence (RFE) dated May 8, 2006, requested that the petitioner submit a complete copy of its Forms 1040 for tax years 2001 and 2002, with all schedules and pages, and a list of monthly recurring household expenses for tax years 2001 and 2002, including but not limited to mortgage or rent payments, automobile payments, installment loans, credit card payments, and household expenses. The director also requested a copy of the petitioner's checking and savings account statements, copies of the beneficiary's W-2 forms if the petitioner had employed the beneficiary, and the petitioner's tax return for 2005.

In response, the petitioner submitted its IRS Form 1040 tax return for tax year 2001 with accompanying schedules, and its IRS Form 1120S for tax year 2005 with accompanying schedules. The petitioner also submitted a document identified as its 2001 Federal Depreciation Schedule dated December 31, 2001, and a copy of an Internet printout that the petitioner's accountant identified as the petitioner's mortgage statement balance as of December 31, 2001. This document indicates a mortgage balance of \$176,236.83 as of that date. In the cover letter with the evidence submitted in response to the director's RFE, counsel noted that the accountant's Federal Depreciation Schedule detailed gross assets of \$360,594 and that after subtracting the petitioner's mortgage debt of \$176,236, the petitioner had net assets of \$184,594 in tax year 2001. Counsel also noted that the petitioner's land and building alone were valued at \$194,802, without considering furniture, fixtures, machines, equipment or cash on hand.

Counsel also stated that the petitioner has been in operation since 1986 and continues to operate successfully. Counsel noted the petitioner's 2005 assets documented by the petitioner's tax return were \$147,457. Counsel calculated this figure by utilizing the petitioner's figure for gross assets of \$253,159,³ minus liabilities of \$32,030 and \$73,672.⁴ Counsel refers to an interoffice memorandum written by former CIS Associate Director for Operations William Yates dated May 4, 2004,⁵ and stated that based on the petitioner's 2001 net assets of \$184,594, a sum greater than the proffered wage, the petitioner has established its ability to pay the proffered wage in tax year 2001. Counsel did not make reference to the petitioner's 2002 tax return, to the petitioner's ability to pay the proffered wage in tax year 2002, or to any itemized list of household expenses for tax years 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel examines the petitioner's accountant's letter and report submitted on appeal and notes that [REDACTED]'s compiled report on page five indicates that the net cash provided by the petitioner's operating activities exceeds \$25,260 (the proffered wage) each year except for tax year 2003 when the petitioner opened East West Grill, a new business. Counsel also states that the accountant noted significant amounts of discretionary expenses identified as "other related party salaries and wages" deducted from income that exceeded the proffered wage each tax year. Finally counsel appears to state that the two sons of the original owner (their father) own 50 percent of the building and property and the petitioner rents the building from the Hsu, Inc. business. Counsel also appears to suggest that the petitioner's total assets during tax years 2005 to

³ This figure is the petitioner's total assets, listed on line 15, Schedule L, of the petitioner's 2005 tax return.

⁴ The figure of \$73,672 is identified as item 19, loans from shareholders. As will be more fully explained further in these proceedings, the AAO does not consider loans from shareholders in its analysis of the petitioner's current liabilities.

⁵ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

2003 are \$147,457, \$165,061, and \$194,817, and that these total assets are greater than the petitioner's total liabilities and are greater than the proffered wage.⁶

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship in tax years 2001 and 2002, and as an S Corporation in tax years 2003 to 2005. On the petition, the petitioner claimed to have been established in 1986, to have a gross annual income of \$839,867, and to currently employ seventeen workers. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel submits an unaudited compiled financial statement for tax years 2003, 2004 and 2005. 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.

Counsel in response to the director's RFE also submitted a statement with regard to the petitioner's mortgage balance and a depreciation schedule for 2001. Neither of these documents is persuasive in these proceedings. The AAO does not consider depreciation when examining the petitioner's net income, as will be explained more fully further in these proceedings. With regard to the mortgage balance statement, the AAO will consider the petitioner's mortgage interest payments established on Schedule A of the sole proprietor's tax return for tax year 2001 as part of the petitioner's household expenses. The AAO notes that as the director alluded to in his RFE, the sole proprietor's cash assets as reflected in its savings, money market or brokerage accounts could be examined as a source of additional funding available to the sole proprietor. However, the petitioner did not submit any such evidentiary documentation to the record with regard to tax years 2001 and 2002 that would further establish the sole proprietor's ability to pay the proffered wage in the 2001 priority year or during tax year 2002.

⁶ The record is not clear as to counsel's reference in this statement. The figures counsel refers to are the total stockholders' equity for tax years 2005 to 2003 listed on page three of the accountant's compiled financial statement submitted on appeal.

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 in 2001 onwards, structured either as a sole proprietor or as an S corporation. Therefore the petitioner has to establish it has the ability to pay the complete proffered wage as of the 2001 priority date and continuing through tax year 2005.

The record reflects that the initial employer who filed the ETA Form 750 is a different entity than the petitioner that filed the instant I-140 petition. The status of successor-in-interest requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Based on the Transfer of Property document submitted to the record with the initial petition, the employer that filed the ETA Form 750 appears to have been a sole proprietorship in the 2001 priority year and continued as a sole proprietorship through tax year 2002. The Employer Identification Number for the initial employer is 84-1042169, as noted on the employer's Schedule C.⁷ The business operations of the initial employer were then transferred to the petitioner formed in 2002 that filed the I-140 petition. Thus, the instant petitioner is a successor-in-interest to the initial employer, a sole proprietorship.

A sole proprietorship is 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). For this reason, in the instant petition, the director requested a listing of the initial petitioner's household monthly expenses in tax years 2001 and 2002, which the petitioner did not submit to the record. The petitioner also did not submit a complete copy of its Form 1040 for tax year 2002 with all schedules.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

As stated previously, the petitioner did not submit a copy of its Form 1040, with accompanying schedules. Therefore the AAO cannot not examine whether the petitioner had sufficient adjusted gross income to pay the

⁷ The present petitioner, a successor in interest to the initial petitioner, is an S Corporation in tax years 2003 to 2005. The current petitioner's EIN is [REDACTED]

proffered wage of \$25,260 in tax year 2002. In the instant case, the AAO can only examine the sole proprietor's tax return for 2001. In 2001, the sole proprietor supports a family of two individuals. The petitioner's 2001 tax return reflects the following information:

	2001
Proprietor's adjusted gross income (Form 1040)	\$ 7,057
Petitioner's gross receipts or sales (Schedule C)	\$ 457,136
Petitioner's wages paid (Schedule C)	\$ 106,416
Petitioner's net profit from business (Schedule C)	\$ 1,201

In the priority year 2001 the sole proprietor's adjusted gross income was not sufficient to cover the proffered wage of \$25,260. Further, the sole proprietor also has to establish that he can pay both the proffered wage and his yearly household expenses.

In response to the director's request for further evidence, the petitioner did not submit an itemized list of its monthly household expenses that covered automobile payments, food, utility bills, clothing, property tax and miscellaneous items. On his Schedule A, Itemized Deductions, the sole proprietor did note items such as medical and dental expenses, state and local income taxes, real estate taxes, and home mortgage interest that totaled \$13,954. The AAO notes that the sole proprietor's adjusted gross income in the priority year 2001 was not sufficient to cover both the proffered wage and this incomplete list of household annual expenses. Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date. As stated previously, since the petitioner did not submit its complete Form 1040 for tax year 2002 or the itemized list of household expenses to the record, the petitioner cannot establish its ability to pay both the proffered wage and its yearly household expenses for tax year 2002.

As stated previously, the petitioner in tax years 2003 to 2005, is structured as an S Corporation. 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 supported by federal case law. *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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *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 Chang*, 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$25,260 per year during the 2003, 2004, and 2005 tax years:

- In 2003, the Form 1120S, Schedule K, Line 23, stated a net income⁸ of -\$17,648.
- In 2004, the Form 1120S, Schedule K, Line 17e, stated a net income of -\$27,642.
- In 2005, the Form 1120S, Schedule K, Line 17e, stated a net income of -\$15,864.

Therefore, for the years 2003 to 2005, the petitioner did not have sufficient net income to pay the 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, contrary to counsel's use of the petitioner's total assets on appeal to establish the petitioner's ability to pay the proffered wage, 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.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁸Where 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income shown on its Schedule K for tax years 2003 and 2004, and additional income and loss for tax year 2005, the petitioner's net income is found on Schedule K of its tax returns for 2003, 2004, and 2005.

⁹According 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.

liabilities are shown on lines 16 through 18.¹⁰ 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 during 2003 were \$6,302.
- The petitioner's net current assets during 2004 were \$3,271.
- The petitioner's net current assets during 2005 were -\$14,020.

Therefore, for the years 2003 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner has not established that it or the initial sole proprietor petitioner, had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. On appeal, the petitioner's accountant states that payments of officers, their wives and mother for salaries, wages, employee benefits and building rent could be reduced to provide funds with which to pay the proffered wages for another employee. In general the wages and benefits already paid to other employees are not available to pay the wage proffered to the beneficiary as of the priority date and continuing to the present. The petitioner, as a sole proprietor, does not indicate any specific officer compensation figures in the Forms 1040 submitted to the record. In the Forms 1120S submitted to the record, the amounts of officer compensation are \$48,724, \$35,180, and \$46,666, respectively, for tax years 2003 to 2005. While the petitioner's accountant mentions this issue on appeal, neither the petitioner nor any of its officers have indicated any willingness or ability to lower any documented officer compensation.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.

¹⁰ Thus, the AAO would not consider loans from shareholders, listed on line 19 on Schedule L, as part of the petitioner's current liabilities.