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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 28 2009

LIN 06 168 52329

IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 Greek/Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an foreign specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 6, 2007 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 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 either 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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001.[1] The proffered wage as stated on the Form ETA 750 is $11.99 per hour ($24,939.20 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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] On appeal, counsel submits a brief and additional evidence, including restaurant reviews of a restaurant named Ambrosia located on 1765 Rockville Pike and the Original Ambrosia Restaurant located at 12015 Rockville Pike, Rockville, Maryland. One *Gazette* review dated December 17, 1997 identifies [redacted] as the owner/chef of the restaurant located at 1765 Rockville Pike. Counsel resubmits a menu for the Original Ambrosia restaurant, and the Forms 1120S for tax years 2000, 2001, 2002, 2003 and 2004 submitted to the record with the petition.

Counsel also submits and a letter from [redacted], CAS & Associates, Inc., Rockville, Maryland. [redacted] states that her firm has been the accountant for the Ambrosia Restaurant for ten years, and that [redacted] has owned and operated the restaurant since 1978. Ms. [redacted] states that the petitioner's annual revenues for tax year 2006 were in excess of 1.3 million dollars, with labor costs for 2006 of approximately $380,000. [redacted] states that the Ambrosia Restaurant has a very loyal customer base, many of whom have frequented the restaurant since the very early days. [redacted] also states that based on the petitioner's gross revenue, the proffered wage of $23,950 is reasonable and justified.

With the petition, the petitioner submitted Forms 1120S for tax years 2000 to 2003 that identified the entity filing the returns as LDD Ltd, T/A Ambrosia Restaurant with EIN [redacted], incorporated on September 1, 1978. These tax returns do not contain any officer's signature on the first page and do not contain any Schedule K to identify any partners or S Corporation shareholders. These returns did indicate that the business entity incorporated as a S Corporation on January 1, 1998. On appeal, the petitioner submits two tax returns for tax years 2005 and 2006 in which the business entity filing the returns is identified as PAMM LTD, Inc Ambrosia Restaurant, 12015 Rockville Pike, Unit F, EIN [redacted], incorporated November 1, 2004. These two tax returns contain Schedules K-1 that indicate [redacted] is the 100 percent shareholder of the business.

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[1] While the cover letter for the ETA Form 750 indicates April 27, 2001, the actual Form ETA 750 indicates a receipt date of April 30, 2001.

[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).

In response to the director's RFE dated December 14, 2006, counsel stated that PAMM Ltd., Inc is a successor in interest of LTD[3] Trading as the Original Ambrosia Restaurant, and that PAMM Ltd. Inc. has the same common ownership as LTD, trading as the Original Ambrosia Restaurant. Counsel further stated that [redacted] is the common owner of both corporations and continues to be the owner of the Original Ambrosia Restaurant. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

In his decision, the director stated that the petitioner did not provide sufficient evidence to establish that it is the successor-in-interest to the LDD, Ltd corporation, doing business as Ambrosia Restaurant, 1765 Rockville Pike, Rockville, Maryland. This status 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).

The evidence in the record of proceeding shows that the two businesses identified on the tax returns are structured as S corporations.[4] On the petition, the petitioner claimed to have been established in 1978 and to currently employ 10 workers. According to the tax returns in the record, both the ETA Form 750 petitioner identified as LDD Ltd, and the I-140 petitioner identified as PAMM Ltd have a fiscal year based on a calendar year On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the ETA Form 750 petitioner.

On appeal, counsel asserts that USCIS "incorrectly applied the franchise status" of the petitioner when it analyzed the petitioner's ability to pay the proffered wage. Counsel also asserts that USCIS did not consider the petitioner's gross income and payroll payments made since 2001 as evidence of the petitioner's ability to pay the proffered wage. Counsel also states that the director failed to consider the overall magnitude of the petitioner's business activities and the totality of circumstances concerning the petitioner's financial performance, citing to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his analysis of the petitioner's ability to pay the proffered wage, counsel notes that the petitioner has been in continuous operation since 1978, and asserts that tax items such as depreciation deductions, amortization of intangibles, capital stock, or stockholder's equity balance can be considered when analyzing the petitioner's ability to pay the proffered wage. Counsel asserts that based on these items, the petitioner had $42,364 available to pay new salaries in 2001; $29,702 in tax year 2002; $53,132 available to pay new salaries in 2003; $311,683 available in 2004; $31,968

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[3] The name of the entity whose tax returns are submitted to the record for tax years 2001, 2002, and 2003 is LDD Ltd, T/A Ambrosia Restaurant1765 Rockville Pike, Rockville, Maryland.

[4] Counsel on appeal and in the petitioner's response to the director's RFE refers to the petitioner's Forms 1120 federal tax returns, however, the tax returns submitted to the record are Forms 1120S, U.S. Federal Income Tax Return for an S Corporation.

available to pay new salaries in 2005, and $46,332 available to pay new salaries in 2006. Counsel also notes the petitioner's cost of labor and payroll payments in tax years 2001 to 2006, as another indicator of the petitioner's ability to pay the proffered wage.

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, United States Citizenship and Immigration Services (USCIS) 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).

On appeal, the petitioner submits no further evidence to establish itself as a successor-in-interest to LDD, Ltd. The petitioner provided no articles of incorporation for the new business incorporated in 2003, or further identification of the owners/shareholders of the initial petitioner. Further, the AAO notes that a website for a restaurant named Ambrosia Grille, 802 Hungerford Drive, Rockville, Maryland anecdotally describes the history of the Ambrosia Restaurant that opened on October 27, 1978 with three partners.[5] This history states that [redacted] and [redacted] joined the partnership of the restaurant on August 1, 1983, and that these two partners became the only two partners in August 1995. The description further states that the shopping mall in which the restaurant operated was torn down and that and "decided to go their separate ways with the agreement that they could both use the Ambrosia name when opening their own restaurants."[6] According to the Ambrosia Grille website, the Ambrosia Restaurant closed on July 30, 2003, and the Ambrosia Grille took 90 percent of the employees of the closed restaurant to its new location. The corporate database for the state of Maryland[7] does not reflect any information for a business identified as Original Ambrosia Restaurant, but it indicates a Trade Name Registration dated August 20, 2003 for Ambrosia Restaurant, 1066 Rockville Pike, Rockville, owned by PAMM, Ltd., Inc, Brookeville, Maryland. According to the database, with a trade name, forfeiture means the filing has lapsed after 5 years and has not been renewed. The Trade Name Approval Sheet document indicates that [redacted] is the owner of the business entity.

Thus, the record does not establish that [redacted], as asserts, has been the owner of the Ambrosia Restaurant since 1978. Further, counsel's assertion that is the

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See http://ww. Ambrosiagrille.com/history2.html (Available as of September 8, 2009.) November 1, 1978 is the date of incorporation noted on the 2000 to 2004 tax returns submitted to the record.

The Gazette restaurant review dated January 26, 2005 submitted on appeal as Exhibit 11 also refers to the I-140 petitioner being "back on the Pike" at a new site.

[7] See http://sdatcert3.resiusa.org/UCC-Charter/. (Available as of September 9, 2009.

"common owner" of both corporations has not been established. The AAO notes that 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).[8] More importantly the tax returns submitted to the record reflect that two distinct business entities have existed from the 2001 priority year through 2006. The record contains no evidence that [redacted] was the sole owner/shareholder of the ETA Form 750 petitioner as of April 2001, and that the ETA Form 750 petitioner simply changed names and location after its restaurant operation was closed due to area development.

Further the I-140 petitioner has not established that it assumed all of the rights, duties, and obligations of a predecessor company. Without establishing whether the current petitioner that filed the I-140 petition is the same petitioner that filed the ETA Form 750, or that a successor in interest status exists in the instant case, the petitioner cannot establish that it has the ability to pay the proffered wage. Thus, the director's decision is affirmed.

For illustrative purposes, the AAO will review whether the tax returns for the two distinct businesses submitted to the record for tax years 2001 to 2006 could establish a continuing ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 during any relevant timeframe including the period from the priority date in 2001 or subsequently. Therefore the petitioner has to establish its ability to pay the entire proffered wage as of the priority date and through tax year 2006.

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, contrary to counsel's assertions, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other items such as amortization of intangibles, capital stock, or loans from shareholders. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 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.

[8] Further, the inconsistencies in the record with regard to ownership and corporate structure make any statements by the petitioner or counsel less credible.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 7, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due; however, the petitioner submitted this tax return on appeal. The petitioner's tax returns demonstrate its net income for tax years 2001[9] to 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income[10] of -$2,355.

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[9] Although a 2000 tax return for LDD Ltd is contained in the record, the priority date for the instant petition is April 30, 2001. Therefore the 2000 tax return would not be probative of the ability to pay the proffered wage in tax year 2001. The AAO will not comment further on the 2000 tax return.

[10] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form

- In 2002, the Form 1120S stated net income of -$10,898.
- In 2003, the Form 1120S stated net income of $2,778.
- In 2004, the Form 1120S stated net income of -$27,215.
- In 2005, the Form 1120S stated net income of - $9,952.
- In 2006, the Form 1120S stated net income of -$59,737.

Therefore, for the years 2001 to 2006, the tax returns for either the ETA Form 750 petitioner or the I-140 petitioner did not have sufficient net income to pay the proffered wage of $24,939.20.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[11] 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 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 tax returns in the record demonstrate end-of-year net current assets for 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $9,230.
- In 2002, the Form 1120S stated net current assets of $6,991.
- In 2003, the Form 1120S stated net current assets of $0.
- In 2004, the Form 1120S stated net current assets of $8,131.
- In 2005, the Form 1120S stated net current assets of $22,479.
- In 2006, the Form 1120S stated net current assets of -$27,821.

Therefore, for the years 2001 to 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

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. The AAO notes that in tax years 2001 to 2006, the net income is found on line 21, of the Form 1120S.

[11] 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.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the tax returns submitted to the record do not establish a continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or the petitioners' net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel refers to the cost of labor and salaries items on the tax returns as evidence of the petitioner's ability to pay the proffered wage. However, the AAO does not consider such items in its analysis of the petitioner's ability to pay the proffered wage. 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 DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years 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 USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner that filed the I-140 petition has not established that it is the successor-in-interest to a restaurant apparently established in 1978 that filed the Form ETA 750.[12] Without establishing this fact, the AAO cannot utilize the identified cost of labor and salaries in the tax returns for 2001 to 2003 in its examination of the current petitioner's totality of circumstances

[12] The AAO notes that the Department of Labor (DOL) allowed a correction to the original ETA Form 750 in 2006 to the petitioner's address that indicates the ETA Form 750 petitioner's address is the same as the I-140 petitioner, namely [redacted] however, there is no evidence in the record as to the basis for such a change.

over the relevant period of time for the instant petition. The tax returns for 2001 to 2003 do reflect salaries and wages paid all three years of over $400,000; however, the tax return for 2004 filed under a distinct EIN reflects cost of labor of only $57,000 which indicates a significantly lowered business operation during that year. The tax returns for 2005 and 2006 indicate significantly increased cost of labor expenses.

The Gazette restaurant review submitted to the record on appeal establishes that the instant petitioner's restaurant operation is well-known within the area; however, this sole fact is not sufficient to establish that the petitioner has a viable business. As stated previously, the instant petitioner has not established its ability to utilize the tax returns for the earlier Ambrosia Restaurant to establish its ability to pay the proffered wage. 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 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.