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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

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 07 230 51933

AUG 23 2010

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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/head cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. 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. Therefore, the director denied the petition.

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.

According to the director's April 30, 2008 denial, at issue in this case is whether 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 ETA Form 9089 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 ETA Form 9089 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 DOL accepted the petitioner's ETA Form 9089 on May 30, 2006.[1] The proffered wage as stated on the ETA Form 9089 is $26,436.80 per year. The ETA Form 9089 states that the position requires twenty-four months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). This office considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

The evidence in the record shows that the petitioner is structured as a C corporation. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner claimed to have been established in 1983, to currently employ 83 workers, and to have a gross annual income of $17,684,065. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar

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[1] U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner has filed 28 other Forms I-140 for 28 additional beneficiaries which have been pending during all or part of the relevant period of analysis in this case. Of these additional petitions, USCIS records indicate that all 28 are approved. Specifically, the petitioner has one approved petition [redacted] for an additional beneficiary which has a priority date of May 25, 2006. The petitioner also has 17 approved petitions [redacted] additional beneficiaries, which have a priority date of May 30, 2006. The petitioner has an approved petition [redacted] for another beneficiary, which has a June 15, 2006 priority date. In addition, the petitioner has six approved petitions [redacted] for six beneficiaries, which have an August 7, 2006 priority date. Also, the petitioner has three approved petitions [redacted] and [redacted] for three beneficiaries, which have a July 23, 2007 priority date.

The beneficiaries in those cases have not yet adjusted to lawful permanent residence. This office does not have information regarding the proffered wages in those cases.

Thus, during 2006, the petitioner had 25 additional sponsored workers whose petitions were pending. During 2007 and following, the petitioner has had 28 additional petitions pending.

The director emphasized in his April 30, 2008 decision that the petitioner must establish the ability to pay the instant wage and the wages of all its sponsored workers whose petitions were pending during the relevant period. The director also indicated that the petitioner had not submitted documentation of the proffered wages associated with its other pending petitions. The AAO would underscore that the petitioner did not submit documentation of the proffered wages of its other sponsored workers on appeal either.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

year. On the ETA Form 9089, which is not signed, the beneficiary claimed to have worked for the petitioner from December 2005 until an unspecified date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on that form, 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, 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).

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. Here, the 2006 Form W-2, Wage and Tax Statement, in the record indicates that the petitioner paid the beneficiary $17,727.72 in 2006, or $8,709.08 less than the proffered wage. There is no other evidence in the record that the petitioner paid the beneficiary during the relevant period.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *See 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages or had labor costs in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service (INS), 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 assertion that the INS 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).

As a preliminary matter, the AAO would underscore that the petitioner also had pending petitions for 28 other beneficiaries during the relevant period of analysis. In his decision dated April 30, 2008, the director indicated that the petitioner had not submitted documentation regarding each of its pending petitions, including documentation of the proffered wage in each case. The director indicated that the petitioner must establish the ability to pay the total amount of the proffered wages for all of its beneficiaries whose labor certifications/petitions were pending during the relevant period. Thus, the petitioner should document each relevant Form I-140 filed and the proffered wage associated with each Form I-140. It should also provide evidence to show that it has the ability to pay the combined wages of all the beneficiaries named in the petitions filed. On appeal, the petitioner again failed to provide documentation of any of its other pending Forms I-140 and the proffered wages in those cases.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although the director specifically stated that without evidence to the contrary he would assume the proffered wages in the other pending cases were the same as in the instant case, the petitioner did not provide documentary evidence of all its pending petitions and the proffered wage associated with each of these petitions. This evidence would have shown how much the petitioner must pay to cover the wages of its other sponsored workers. USCIS must have specific information regarding the petitioner's added expense of these additional wages before it may analyze the petitioner's ability to pay the instant proffered wage.

Further, on appeal, the petitioner acknowledged only 24 of its 28 additional filings. Yet, USCIS records show that the petitioner had 28 additional pending petitions in the relevant period. This inconsistency in the record casts doubt on all the evidence in the record.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 9, 2008 with the receipt of the petitioner's submissions in response to the RFE. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The 2006 tax return demonstrates its net income for 2006, as shown in the table below.[3]

- The 2006 Form 1120 states net income of $621,996.

First, USCIS records indicate that the petitioner had 25 of its 28 additional petitions pending during 2006.[4] The petitioner must demonstrate the ability to pay these 25 salaries plus the balance of the instant wage not paid to the beneficiary in 2006, or $8,709.08, before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage of each of its relevant sponsored workers. Thus, the petitioner has not demonstrated it had sufficient net income to pay the balance of the instant proffered wage and all its sponsored workers' wages in 2006.[5]

Therefore, for the year 2006, the petitioner has not established that it had sufficient net income to pay the full proffered wage and all its sponsored workers' wages.

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[3] The petitioner's 2005 tax return is in the record. This return is not analyzed in this section as it covers the period just before the May 30, 2006 priority date. The 2005 tax return will be considered later in this discussion, when reviewing the totality of the petitioner's financial circumstances.

[4] All 28 additional petitions were pending during 2007 and following.

[5] The AAO notes that if the proffered wage in the other 25 pending cases was the same as in the instant case, the petitioner would need $660,920 to cover those wages. The director indicated in the notice of decision that where the petitioner fails to document the proffered wages in its other pending cases, he would consider the proffered wage to be at the same level as the instant proffered wage. However, the AAO would underscore that even if the petitioner had shown an ability to pay $660,920 plus the balance of the instant wage ($8,709.08), this office would not have found that the petitioner had shown an ability to pay the instant wage and all its sponsored workers' wages. The petitioner must document the proffered wages for its various pending cases and demonstrate an ability to pay those specific wages in addition to the instant wage (or balance of those wages, where the petitioner documents that it paid those beneficiaries) before USCIS will find that it has shown an ability to pay the 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, USCIS will review the petitioner's assets. However, total assets will not be considered in the determination of the ability to pay the proffered wage. 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, USCIS 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.[6] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand. Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 tax returns demonstrate its end-of-year net current assets for 2006 as shown in the table below.

- The 2006 Form 1120 states net current assets of $507,543.

Again, USCIS records indicate that the petitioner had petitions pending for an additional 25 sponsored workers in 2006. The petitioner must demonstrate the ability to pay these 25 wages plus the balance of the instant wage ($8,709.08) before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of its sponsored cases, as the director indicated that it should. Thus, the petitioner has not demonstrated that it had sufficient net current assets to pay the balance of the instant proffered wage and all its sponsored workers' wages in 2006.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date forward and its sponsored workers' wages during this period through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may also 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. 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

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

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.

Here, the petitioner incorporated in 1983 and has 83 employees. It has not established its historical growth since incorporating. Its gross sales or receipts did increase during the two years for which the petitioner provided tax returns: $17,684,065 in 2005 and $18,703,688 in 2006. However, such growth is not sufficient to overcome the evidence in the record which indicates that the petitioner has not established the continuing ability to pay the wage and all its sponsored workers' wages. Also, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage from the 2006 priority date onwards.

On appeal, counsel suggested that this office should consider the amount listed as cost of labor on its 2006 Schedule A, $4,089,710, as wages paid to its other sponsored workers in this case. This is not correct. The petitioner must provide independent, objective documentation of the names of its various sponsored workers; documentation of the proffered wages associated with its other petitions; and documentation of having paid each of its sponsored workers (such as Forms W-2) the stated proffered wage during the relevant period. The record is not clear regarding whether the cost of labor amount listed on the Schedule A ($4,089,710) and the total salaries paid ($611,689) in 2006 were all funds needed to pay the petitioner's non-sponsored workers' wages, and whether the petitioner had an additional 25 sponsored workers beyond the 83 employees it stated were in its employ on the Form I-140. 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)).

Counsel asserted that the director should not assume that the proffered wages in the other pending cases were the same as in the instant case because he did not have evidence of this. Counsel then indicated that the petitioner has only 24 additional beneficiaries, not 28 as stated by the director. However, he submitted no documentary evidence regarding the stated 24 additional petitions to support this claim. Counsel also listed what he stated were some of the other sponsored workers'

wages; however, he did not document that these were indeed the proffered wages in these other pending cases by submitting, for example, copies of labor certification applications certified by the DOL and issued to the petitioner during the relevant period. 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)).

Counsel also indicated that the director should have considered whether the petitioner could pay the balance of the proffered wage, using net income or net current assets; and that if it could, USCIS should find the petitioner has shown an ability to pay the wage. The AAO notes that if the petitioner had only one beneficiary whose petition was pending during the relevant period, this would have been sufficient. However, the petitioner had over two dozen petitions pending during the relevant period. The petitioner must demonstrate an ability to pay all of its sponsored workers' wages, as these wages are an additional expense for the petitioner, before USCIS may find that it has shown an ability to pay the wage. Counsel also suggested that the director should assume that the petitioner paid each of the sponsored workers whose petitions were pending in 2006 the same amount which the petitioner paid the instant beneficiary ($17,727.72) as reflected on the 2006 Form W-2 in the record. This is not correct. USCIS will consider wages paid the other sponsored workers only so far as the petitioner documents the amounts paid these workers. For example, if the petitioner submitted, first, documentation of whom its other sponsored workers are, and, second, a Form W-2 for each worker or similar independent evidence which reflects the specific amount the petitioner paid each sponsored worker during the relevant period, this office would use that evidence to analyze the petitioner's ability to pay the wage. USCIS will not rely on counsel's unsupported assertion that the petitioner paid its other sponsored workers in 2006. 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)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, regarding the petitioner's 28 additional pending petitions, counsel indicated that the petitioner need not establish an ability to pay a wage associated with a petition that has already been approved. This is not correct. The petitioner must show, for each of its sponsored workers, the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). USCIS records indicate that none of the petitioner's additional 28 sponsored workers have adjusted yet to lawful permanent residence.

Beyond the decision of the director,[7] although a Form ETA 9089, Application for Permanent Employment Certification, approved by the DOL, accompanied the petition, it was not signed by

[7] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (which states that the AAO reviews appeals on a *de novo* basis).

the alien, counsel, or the petitioner as required by 20 C.F.R. § 656.17. The regulation at 20 C.F.R. § 656.17 which describes the basic labor certification process provides in pertinent part:

> (a) Filing applications.
>
> > (1) . . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

The petitioner has not established its ability to pay the instant wage and all its sponsored workers' wages. The petition must be dismissed on this basis. 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.