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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

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 07 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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[1] is a commercial bakery. It seeks to employ the beneficiary[2] permanently in the United States as a doughnut maker. 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 (the DOL). The director determined that the petitioner has not submitted sufficient evidence to demonstrate that beneficiary is qualified to perform the duties of the proffered position. 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.

Beyond the decision of the director, another issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the priority date for other beneficiaries of other pending and approved petitions as well as the proffered wage for the beneficiary. 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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

An issue in this case is whether the petitioner demonstrated that the petitioner has submitted sufficient evidence to demonstrate that beneficiary is qualified to perform the duties of the proffered position.

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[1] The Federal Employer Identification Number (EIN) for the petitioner is [redacted]

[2] The beneficiary's full name according to his passport is [redacted]

[3] 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 Form ETA 750 states that the position of doughnut maker requires three months experience or three months experience in the related occupation of baker.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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).

Accompanying the petition and labor certification, counsel submitted a letter from the president of the petitioner dated July 9, 2007, identifying the beneficiary and describing the offered position.

The Form ETA 750, Part A, Line 13, describes the job duties of doughnut maker as follows:

> Mixes, forms, fries dough to produce doughnuts. Ejects individual doughnuts into hot cooking oil. Hand dips doughnuts to glaze them. Works under direct, close supervision.

On the Form ETA 750 Part B, Item 15, the beneficiary stated under penalty of perjury that he was previously employed as a baker from 1997 to 1999 by a bakery, [redacted]. No employment reference from [redacted] is found in the record and no other employment experience is stated on the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) Other documentation—
>
> > (D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

On March 13, 2008, the director issued a RFE asking, *inter alia,* for the petitioner to submit additional information regarding the beneficiary's work experience before the priority date.

In response, the petitioner on April 28, 2008, submitted a statement dated July 15, 2005, from [redacted]

The letter stated in pertinent part:

> To Whom It May Concern:
>
> This is to certify that [the beneficiary] worked at [redacted]
> He was a full time, permanent employee from January 11, 2004, to June 15, 2004.

> [The beneficiary] worked as a doughnut maker. [The beneficiary's] pay rate was $10.00 per hour. He made approximately $32,000.00 a year in salary.[4]
>
> His duties included making doughnuts from scratch, frying them and organizing them. Also, he was in charge of cleaning and maintenance of the machines.

No employment records from [redacted] were submitted to substantiate the above recited employment experience. Further, such employment with [redacted] was not listed by the petitioner with the petition when filed, or by the applicant when the labor certification was obtained. After carefully considering the entire record in this case, it is determined that the petitioner's evidence regarding the beneficiary's employment experience prior to November 23, 2004, is not credible. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In any event, the instant labor certification is not predicated upon such employment.

There is insufficient in the record to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements as stated above, or sufficient evidence based upon the one very brief job reference letter that he acquired the experience at [redacted] Therefore, the sole statement submitted in the record concerning the beneficiary's qualifications is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. No other letters or statements according to the regulation at 8 C.F.R. § 204.5(l)(3) were submitted by the petitioner.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits a legal brief; a court case decision *Matter of Leung,* 16 I&N Dec. 2530, and two USCIS Interoffice Memorandums (HQ 70/23.1-P) dated April 6, 2001, and (HQ 70/23.1) dated March 9, 2005.

Counsel makes the following arguments:

- Whether [the director] correctly cites *Matter of Leung* regarding the interpretation that new employment not listed when the labor certification was certified when the visa petition was filed is not credible for the issuance of an immigrant visa classification.

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[4] The AAO notes that an hourly rate of $10.00 per hour equates to an annual wage of $20,800.00, not $32,000.00.

Counsel's assertion is misplaced. The director correctly cited *Matter of Leung* in this matter. The director's decision, and the Board of Immigration Appeals (BIA) dicta notes in *Matter of Leung, Id.*, that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The AAO notes that the reputed [redacted] employment experience is not noted on the labor certification, or by the petitioner when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

- Whether it is inconsistent for the [director] to cite a strict-line rule regarding labor certifications and experience disclosure when it is clear that under Section 245(i), [USCIS] issued memos of approvable [sic] when filed when it clearly stated that labor certifications would be acceptable even if filed, necessarily not complete.

Examining counsel's brief, it appears that he is making the contention that since *Matter of Leung* concerned an adjustment matter under a Form I-485 application, and this matter involves a visa preference petition, "we are dealing with eligibility requirements of the I-140" petition, which in this case involves both the ability to pay the proffered wage and whether the petitioner submitted sufficient evidence to demonstrate that beneficiary is qualified to perform the duties of the proffered position. Counsel is correct. This matter does involve the determination based upon the totality of the petitioner's circumstances, the petition, the labor certification, and the evidence submitted, whether the petitioner has the ability to pay the proffered wages for all sponsored beneficiaries, and whether the petitioner demonstrated that the petitioner has submitted sufficient evidence to demonstrate that beneficiary is qualified to perform the duties of the proffered position.

However, counsel is incorrect that the omission from the labor certification of the beneficiary's reputed prior employment experience at [redacted], not explained by the petitioner, counsel or the beneficiary, may be ignored or not given due consideration concerning the beneficiary's credibility when he signed the Form ETA 750 B under penalty of perjury. Counsel's interpretation of the USCIS Interoffice Memorandum is incorrect and would not lead or support a contrary decision that an inconsistent or incomplete labor certification "would be acceptable even if filed, necessarily not complete."

- Whether [the director] goes beyond an interpretive rule and has made substantive change which requires the [the director] to follow notice and comment procedures under the administrative Procedures Act.

Examining counsel's brief, he is contending that "if [the director] is going to create a rule which is going to substantially affect applications, then it would be required under the Administrative Procedure Act, to follow the rule procedures, advertisement and comment." It is important to note

the I-140 petition is not an application, although an Application to Register Permanent Residence or Adjust Status is an application. There is no Application in the record. Insofar as counsel's arguments pertain to petitions, his contentions are not relevant to the matter in hand. Counsel is asserting that an incomplete, or in this instance, an inconsistent labor certification, may be sufficient and the director may approve a petition under these circumstances and find the beneficiary eligible for preference visa benefits. Counsel offers no regulation or case decision to support this claim, and on the contrary, *Matter of Leung* provides dicta to the contrary. Counsel's assertion is misplaced and not supported by the record. Counsel has not provided an excuse or explanation for the omission of the reputed employment experience with [redacted] from the labor certification.

Beyond the decision of the director, another issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the priority date for other beneficiaries of other pending and approved petitions as well as the proffered wage for the beneficiary.

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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on November 23, 2004. The proffered wage as stated on the Form ETA 750 is $10.09 per hour ($20,987.20 per year).

Accompanying the petition and labor certification, counsel submitted, inter alia, the petitioner's federal income tax returns (Forms 1120S) for 2004, 2005, and 2006.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1994 and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 17, 2004, the beneficiary did not claim to have worked for the petitioner.

U.S. Citizenship and Immigration Services (USCIS) electronic records indicate that the petitioner has filed at least twelve (12) I-140 petitions including the subject petition.

Alien's name:[5]	USCIS Receipt number:	Alien's Entry Date into the U.S.	Petitioner's EIN	Record Date of the I-140 Filing	Alien's Permanent Residency Status
-----	[redacted]	12/14/1997	[redacted]	04/05/2004	Not Adjusted
-----		07/04/2000		07/06/2004	Not Adjusted
-----		10/17/1995		04/02/2004	Not Adjusted
-----		07/04/2000		08/04/2004	Not Adjusted
-----		06/03/1993		07/28/2004	Not Adjusted
-----		06/03/1993		07/28/2004	Not Adjusted
-----		03/05/2002		09/08/2008	Not Adjusted
-----		10/25/2004		09/08/2008	Not Adjusted
-----		10/16/1996		11/13/2007	Not Adjusted
-----		11/22/2000		10/24/2007	Not Adjusted
-----		10/10/1999		10/19/2007	Not Adjusted
[redacted]		06/26/2003		07/26/2007	Not Adjusted

The petitioner must demonstrate an ability to pay the wages of its additional sponsored workers as well as the wage of the instant beneficiary. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe.

[5] The alien beneficiaries' identities, other than the subject beneficiary, are obscured for privacy purposes.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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.

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. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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 April 28, 2008 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 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 was the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income[6] of $130,543.00.
- In 2005, the Form 1120S stated net income of $31,272.00.
- In 2006, the Form 1120S stated net income of $108,224.00.

Therefore, for the year 2005, the petitioner more likely than not did not have sufficient net income to pay the proffered wages of its sponsored workers. Likewise, the record is also not persuasive in establishing that the petitioner had the ability to pay all the proffered wages in 2004, 2006, and subsequently.

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.[7] 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 petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

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[6] 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 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 (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 July 20, 2010) (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, and other adjustments shown on its Schedules K for 2004 through 2006, the petitioner's net income is found on Schedule K of its tax returns.

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

- In 2004, the Form 1120S stated net current assets of $21,692.00.
- In 2005, the Form 1120S stated net current assets of <$13,309.00>.
- In 2006, the Form 1120S stated net current assets of $19,069.00.

Therefore, for the years 2004, 2005, 2006, and subsequently, the record is not persuasive in establishing that the petitioner had sufficient net income to pay the proffered wages of all its sponsored workers.

Even if the evidence in the instant case indicated financial resources of the petitioner sufficient to pay the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of all Form I-140 petitions filed by the petitioner, nor about the priority dates of any of the Form I-140 petitions, nor about the present employment status of other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

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. 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 claims that the business was established in 1994 and to currently employ 25 workers. The petitioner's gross receipts have been consistent through 2004 to 2006, ranging from $2,911,540.00 in 2004 to $2,400,538.00 in 2006. In 2004 to 2006, the petitioner has

not submitted sufficient evidence to show its ability to pay the proffered wages of all sponsored beneficiaries including the subject beneficiary. No wage records, reputation of the petitioner's business prospect, or an offer to pay the sponsored beneficiaries' wages from officers' compensation is found in the record. 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 for all sponsored beneficiaries.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.