(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

Date: MAY 2 3 2013 Office: TEXAS SERVICE CENTER FILE:

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 law firm. It seeks to employ the beneficiary permanently in the United States as a paralegal. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, electronically certified by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary qualified for the position offered. The petition was denied, 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 May 31, 2011 denial, the issues in this case are (a) 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, and (b) whether the beneficiary possessed the requisite work experience in the job offered prior to the priority date.

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 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.[1]

With respect to the petitioner's ability to pay, 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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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).

Here, the ETA Form 9089 was filed by the petitioner and accepted for processing by DOL on September 6, 2006. The proffered wage as stated on the ETA Form 9089 is $41,314 per year. To demonstrate that the petitioner has the continuing ability to pay $41,314 per year from September 6, 2006, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income, for the years 2006 through 2010;
- The beneficiary's IRS Forms W-2 Wage and Tax Statement for the years 2006 through 2010;
- The IRS Forms W-3 Transmittal of Wage and Tax Statements for the years 2006 through 2012;
- The IRS Forms W-2 issued to all employees including the partners from 2006 through 2012;
- IRS Forms 941, Employer's Quarterly Federal Tax Returns, for all quarters from 2007 through the first quarter of 2013; and
- Copies of the petitioner's bank statements issued in December 2009, December 2010, December 2011, and December 2012.

The record indicates that the petitioner is structured as a domestic limited liability company and filed its tax returns on IRS Form 1065.[2] On the petition, the petitioner claimed to have been established in April 2005, to currently have four employees, and to have gross annual income and net annual income of $246,334 and ($877), respectively.

[2] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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'l Comm'r 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'l Comm'r 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 beneficiary received the following wages from the petitioner between 2006 and 2010:

Tax Year	*Actual wage (AW) (Box 1, W-2)*	*Yearly Proffered Wage (PW)*	*AW minus PW*
2006	$33,575.20	$41,314	($7,738.80)
2007	$36,246.94	$41,314	($5,067.06)
2008	$36,245.98	$41,314	($5,068.02)
2009	$34,199.88	$41,314	($7,114.12)
2010	$21,046.08	$41,314	($20,267.92)

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay the difference between the actual wage and the proffered wage, which is:

- $7,738.80 in 2006;
- $5,067.06 in 2007;
- $5,068.02 in 2008;
- $7,114.12 in 2009;
- $20,267.92 in 2010; and
- The full proffered wage of $41,314 in 2011.

The petitioner can pay these amounts, noted above, through either its net income or net current assets. If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will 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*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the AAO closed on April 16, 2013 with the receipt by the director of the petitioner's submissions in response to the AAO's Notice of Intent to Dismiss and Derogatory Information (NOID/NDI) dated February 27, 2013. As of that date, the petitioner's 2011 federal income tax return was the most recent return available. The petitioner, however, failed to submit a copy of its 2011 federal tax return. The petitioner's tax returns demonstrate its net income (loss) for the years 2006 through 2010, as shown below:

Tax Year	*Net Income (Loss)*[3]	*The Remainder of the PW*
2006	($6,789)	$7,738.80
2007	($1,457)	$5,067.06
2008	($29,373)	$5,068.02
2009	($49,592)	$7,114.12
2010	($13,733)	$20,267.92

Therefore, the petitioner does not have sufficient net income in any of the year shown above to pay the beneficiary's proffered wage or the remainder of his 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, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than

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[3] For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) page 5 (2008-2012) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (last accessed May 21, 2013) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the net income (loss) is found on line 22 of page one of the petitioner's Form 1065.

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

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 the years 2006 through 2010, as shown below:

Tax Year	*Net Current Assets*	*The Remainder of the PW*
2006	$11,784	$7,738.80
2007	$10,327	$5,067.06
2008	$10,954	$5,068.02
2009	$11,362	$7,114.12
2010	$17,629	$20,267.92

Therefore, the petitioner does not have sufficient net current assets to pay the proffered wage in 2010 and 2011. Based on the net income and net current asset analysis, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

We acknowledge the receipt of the IRS Forms 941 for all quarters from 2007 through 2013 (1st quarter) as well as the IRS Forms W-3 and W-2 for the years 2006 through 2012. Based on the evidence submitted above, the petitioner has employed four or five employees from 2006 to 2012, and spends, on average, about $300,000/year in employees' wages/salaries.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence in the record showing that the petitioner intends to replace one or more of the employees with the beneficiary.

We also learn based on the evidence submitted above, that each partner of the petitioner, on average, received about $80,000/year in compensation from 2006 to 2011. In 2012, each partner only received about $17,000. The record does not reflect that any of the petitioner's partners would be able or willing to forgo part or most of his compensation to pay the remainder of the beneficiary's proffered wage in 2010 or the full proffered wage in 2011.

In addition, we have also reviewed and considered the balances available on the petitioner's business bank account as of December 31st of each year from 2009 through 2012. We are not persuaded that the petitioner has sufficient cash to pay the remainder of the beneficiary's proffered wage in 2010 or the full proffered wage of $41,314 in either 2011 or 2012. We note that the amounts available in the petitioner's bank account between 2010 and 2012 are substantially below the remainder of the beneficiary's proffered wage in 2010 and the full proffered wage in 2011 and 2012.[5]

[5] In 2010, the average balance is $8,175.40. In 2011, the average balance is $6,889.22. In 2012, the average balance is $8,049.59.

Moreover, the petitioner's reliance on the balances in the petitioner's bank account is misplaced. Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows USCIS to accept or the petitioner to submit additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for the years 2006 through 2010. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its 2010 tax returns or in the cash entry on Schedule L, for instance. Further, the bank statements only show balances in the petitioner's bank account in a particular time period. They do not explain how those balances can help the petitioner pay the proffered wage during the qualifying period from the priority date. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay.

Finally, although not raised on appeal, 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 (Reg'l Comm'r 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.

We acknowledge that the petitioner is an ongoing business; however, the record is devoid of evidence regarding the petitioner's reputation. Unlike *Sonegawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay

the proffered wage particularly in 2010 and 2011. Assessing the totality of the circumstances in this individual case, the AAO is not persuaded that the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence.

Concerning the beneficiary's qualifications, the petitioner must also demonstrate that the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL and submitted with the instant petition as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the occupational title or the position for which the petitioner seeks to hire the beneficiary is paralegal. The job duties described under section H.11 of the ETA Form 9089 are as follows: "Assist attorneys in drafting, editing, and preparing documents submitted to the federal or state agencies." Section H.2 of the ETA Form 9089 indicates that the position requires a minimum of 24 months (two years) of work experience in the job offered.

On the ETA Form 9089, section K, the petitioner stated that the beneficiary worked as a paralegal for for about eight months, from February 1, 2005 to August 9, 2005; and at for two years, from July 1, 1997 to July 31, 1999. To demonstrate that the beneficiary had the requisite work experience in the job offered, the petitioner initially submitted a letter of employment certification dated August 16, 2003 from , principal lawyer at stating that the beneficiary worked as a paralegal from July 1995 to January 1997 and then again from July 1997 to July 1999.

On April 13, 2011 the director sent the petitioner Notice of Intent to Deny (NOID) stating that the record contains information that contradicts the declaration of experience from Specifically, the director noted that a previously filed Form I-485 application (Application to Register Permanent Residence or Adjust Status) by the beneficiary contained a Form G-325 (Biographic Information) that requires the beneficiary to list her last five years of employment. This Form G-325, according to the director, states that the beneficiary was self-employed from January of 1997 to September 1999. The director advised the petitioner to submit independent objective evidence to resolve the inconsistencies in the record, as noted above.

In response to the director's NOID, the petitioner submitted the following evidence:

- A letter dated May 10, 2011 from attesting to the beneficiary's employment as a paralegal from July 1995 to January 1997 and again from July 1997 to July 1999; that the beneficiary was compensated based on each completed work assignment; and that the beneficiary was allowed to take work home and complete as much assignments as she wanted to; and
- A sworn statement dated May 10, 2011 from the beneficiary stating that she initially worked at on a daily basis; however, after completing a period of training, she was permitted to complete her work assignments on her own from home; that she was compensated for her work based on each successfully completed work

assignment; and that the individual who prepared the Form G-325 must have interpreted her previous employment arrangement as self-employment.

On appeal, the petitioner further submits the following evidence to show that the beneficiary worked as a paralegal at Naval and Associates:

- A letter dated June 30, 2011 from stating that he is a partner in that he hired on several occasions to represent on legal matters; that he met the beneficiary during his several visits to and that the beneficiary drafted several contracts, prepared reports, affidavits, and helped in several court proceedings;
- A letter from stating that she was an employee of from March 1994 to April 2006; that she was the office clerk during that period; that the beneficiary joined as a paralegal in July 1995; that the beneficiary worked from July 1995 to January 1997, and again from July 1997 to July 1999; and that the beneficiary worked from home on certain days;
- A copy of the beneficiary's work product when she worked as a paralegal at [6]
- A letter dated June 14, 2011 from certifying that the beneficiary used to maintain an account with the bank in 1996 but no records could be produced as the bank is not required to keep records beyond 10 years; and
- A letter dated June 20, 2011 from , chartered accountant, certifying that the beneficiary was self-employed from July 1997 to July 1999; that her average earnings during the period stated above was Rs. 2,000 (Indian Rupees) per month; and that she was not required to file income tax returns due to her low income.

Taken as a whole, the AAO is persuaded that the evidence submitted above shows that the beneficiary had the minimum work experience in the job offered as of the priority date. Both letters of employment verification from comply with 8 C.F.R. § 204.5(l)(3)(ii)(A) in that both contain a sufficient description of the beneficiary's experience. The petitioner has explained why independent objective, i.e. the beneficiary's payroll records, or income tax, cannot be obtained. The petitioner states that due to the passage of time and because of the beneficiary's income level, it is difficult to obtain documentation related to her prior employment in India. USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence is not available. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i).

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[6] The work product is a letter dated April 11, 1998 signed by the beneficiary and addressed to The letter was written on the formal paper of with the company's letterhead and watermark.

Here, the petitioner provides letters from a former client and the office clerk of the law firm where the beneficiary used to work in India, a sample work product, and other documentation showing that primary evidence, i.e. payroll records, or tax returns, is no longer available. We also note that the record contains another Form G-325 and Form ETA 750B that include the beneficiary's employment as a paralegal at from 1995 to 1999. Under these circumstances, we find that the petitioner has established by a preponderance of the evidence that the beneficiary more likely than not worked as a paralegal in India for at least two years and had the requisite work experience in the job offered as of the priority date.

In summary, the appeal is dismissed because the petitioner has failed to show by a preponderance of the evidence that it has the continuing ability to pay from the priority date. 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.