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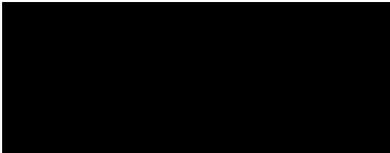


FILE: LIN-04-003-50767 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

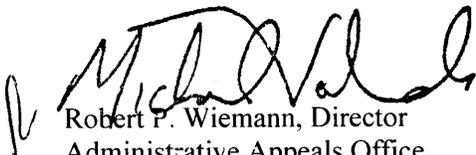
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director of the Nebraska Service Center denied the third preference visa petition and dismissed a subsequent motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an ornamental plaster restoration and design business. It seeks to employ the beneficiary permanently in the United States as an ornamental plaster designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 17, 2002. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour, which amounts to \$41,600 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$58,443, and to currently employ two workers. In support of the petition, the petitioner submitted its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for the years 1999, 2000, 2001, and 2002.<sup>1</sup> The petitioner's reported net (ordinary) income in 2002 was \$8,909 and its net current assets were -\$1,537. The petitioner also submitted five unnotarized personal guarantees titled "Personal Guaranty of the Wages of [the beneficiary]" signed by [REDACTED] (Mr. [REDACTED]) (Mr. [REDACTED]) M.D. (Dr. [REDACTED]) (Mr. [REDACTED]) and [REDACTED] (Mr. [REDACTED]). The guarantees all contain a section that states that each guarantor acknowledges that [the petitioner] would not be able to show sufficient ability to pay the prevailing wages of [the beneficiary] but for [the guarantees]." The guarantees state that each of the five guarantors would provide \$10,000 per year for three years towards the

<sup>1</sup> Financial information preceding the priority date in 2002 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2002.

“prevailing wages” owed by the petitioner to the beneficiary in the event that the petitioner could not pay the proffered wage to the beneficiary. No other information was provided concerning the guarantors, such as their identities or financial statuses.

With the initial petition, the petitioner submitted copies of newspaper stories, some with identifying information about the newspapers and dates and others not, describing the petitioner’s owner’s skills as an artisan. The petitioner also submitted copies of letters from various clients stating their intention to hire the petitioner if its business grew large enough to handle the extra work. Many letters also state their appreciation of past artisan work provided at reasonable rates by the petitioner. One newspaper story identifies one of the guarantors, Mr. [REDACTED] as the petitioner’s owner’s friend.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on March 17, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested additional evidence such as audited profit/loss statements, bank account records, and/or personnel records.

In response, the petitioner submitted an unaudited projection prepared by the petitioner’s certified public accountant, [REDACTED] (Mr. [REDACTED] dated May 20, 2004. Mr. [REDACTED] accompanying cover letter stated the following, in pertinent part:

These projections are intended to demonstrate [the petitioner’s] ability to ‘support’ an additional ornamental plaster designer.

These projections are based on [the petitioner’s owner’s] knowledge and experience in his very specialized trade. He believes very strongly that [the petitioner] could increase significantly its’ [sic] [s]ales of ‘specialized plaster’ work. His belief is based on the facts that there is really no one but him in an 800 mile radius able to do this work and there are many people and organizations that need and want his services.

[The petitioner’s owner] is a small business owner. He personally does all the professional work, bids out all new jobs, and manages most of the office work. [The petitioner’s owner] is the only one able to do ‘restorative’ plaster work on Historical Buildings in a very large area of the USA. . .

Additionally, counsel’s responsive letter to the director’s request for evidence asserted that “[t]he only obstacle to [the petitioner’s] ability to meet its existing customer’s growing demand is the lack of suitable ornamental designers in the United States,” and stated that hiring the beneficiary will increase the petitioner’s revenues and profits. Counsel cited to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of that assertion. Counsel asserted that Citizenship and Immigration Services (CIS) cannot ignore the income guarantees provided as “legally binding guarantees” to bolster the petitioner’s obligation to pay the proffered wage, and cited to *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988).

The petitioner's owner also submitted a letter in response to the director's request for evidence in which he described his background and the need for the beneficiary's employment to meet the petitioner's expectations for a growing business. He stated the following, in pertinent part:

I do not have the training or the skills necessary to create original and historically accurate ornamental plaster design sketches and drawings from scratch. For that kind of sophisticated work, we send drawings and pictures of structures on which we are working to [the beneficiary] in Russia and he creates original and historically accurate architectural drawings and designs for our use. I then use those drawings to perform the work for which [the petitioner] is known.

Understandably, when we have to rely on [the beneficiary] to complete a project it takes [the petitioner] several months before it can begin to implement his designs. Occasionally, because I am the only person with the appropriate amount of training in classical and old world techniques who can implement [the beneficiary's] designs, it takes [the petitioner] even longer to complete one project and move on to the next one (on at least one occasion I had so much work that I asked my brother to come from Russia to help me for short period). Furthermore, the process of sending drawings and pictures to [the beneficiary] for original design is not always feasible. Occasionally, we have had to invite [the beneficiary] to the United States to study certain structures first hand and to help us design particular pieces of ornamental design. That unique partnership between our company and [the beneficiary] has been the corner piece of our success and the reason that our services are so much in demand.

The petitioner's owner continued to discuss specific projects the beneficiary helped him complete, such as the [REDACTED] a home he stated is listed on the National Historic Register, and is accompanied by an unnotarized testimonial letter from the owners of that home. Also submitted into the record of proceeding are what appear to be architectural drawings, some marked at the bottom "[the beneficiary's] design" and others without certification as to the creator of those drawings. The petitioner's owner states that the [REDACTED] owners have solicited his services for six additional projects all worth \$100,000 each, but he cannot complete them without the beneficiary's assistance. Invoices addressed to the restoration designer of the [REDACTED] are in the record of proceeding that show that the quote had not yet been accepted. The petitioner's owner resubmits previously submitted unnotarized letters from clients stating their interest in retaining the petitioner's services and he describes the amount of business he is foregoing by not having the beneficiary's assistance. Finally, the petitioner's owner submits an unaudited list of "names/contact persons for projects for which [the petitioner] has submitted bids."

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 6, 2004, denied the petition. The director stated the following, in pertinent part:

[T]he petitioner asserts that an enormous amount of contracted work projects have been lost due to the lack of the beneficiary's services to the petitioner. Evidence of available work was presented. The petitioner asserts that the projected income from these lost projects would have brought in sufficient income to pay the beneficiary.

The asserted speculative income derived from services rendered by the beneficiary is not acceptable evidence of the petitioner's ability to pay the proffered wage. The actual funds

must be available to the beneficiary at the time of filing a Form ETA 750 with the Department of Labor (May 17, 2002).

It is noted for the record that the petitioner's personal guaranty of the wages is unacceptable because the petitioner's personal funds are not considered financial business assets at risk.

Counsel subsequently filed a motion to reconsider on August 9, 2004. In his motion, counsel cited *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that "the entire financial circumstances of [the petitioner] should be considered." Counsel cited to *Masonry Masters, Inc. v. Thornburgh, supra*, *Matter of Sonogawa, supra*, *Full Gospel Portland Church v. Thornburgh, supra*, as well as *Ohsawa America*, 1988-INA-240 (BALCA 1988) to assert that the director erred by failing to consider the totality of the petitioner's financial circumstances. Counsel also stated that the director erred by failing to consider the "legally binding" income guarantees by the petitioner's customers, who are "highly sophisticated business owner . . . unlikely to pledge their personal or business funds to benefit [the petitioner] unless they are convinced that [the petitioner] will be able to meet the increased demand for its services." Finally, counsel states that denying the petitioner puts the petitioner in a "catch twenty-two" because it "cannot grow to meet its customers' existing demand and capitalize on its unique niche market without the significant contributions of [the beneficiary], but [the beneficiary] is unable to begin work for [the petitioner] until [the petitioner's] profits increase to satisfy [CIS] that it can meet the wage requirements."

The director denied the motion to reconsider on August 24, 2004 because it "neither provides new evidence, provides precedent decisions to consider, nor establishes that the decision was incorrect based upon the evidence of record at the time."

On appeal, the petitioner reasserts arguments made by counsel in the past and states that he is willing to pledge the equity in his home, \$80,000, to pay the proffered wage. He submits a copy of an appraisal of his personal residence.

The unaudited projection of revenue that counsel submitted in response to the director's request for evidence is not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the assets of the petitioner's owner is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Thus, the AAO will not consider the petitioner's owner's real estate holdings.<sup>2</sup>

<sup>2</sup> Even if the AAO could consider the petitioner's owner's real estate holdings, a home is not the type of easily

Likewise, the AAO concurs with the director concerning the personal guarantees submitted in this case. The “legally binding” nature of the guarantees is unclear. None of the guarantees were notarized providing an official verification of the identities of the individuals signing them. Additionally, no information or evidence was provided concerning the signatories’ identities or financial circumstances. Although counsel asserts they are the petitioner’s customers are “sophisticated” businessmen, 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). Additionally, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). None of the guarantors have a legal obligation to pay the wage according to *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at 3 and *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. at 530 since they are unrelated to the petitioner. Finally, counsel is incorrect that the decision in *Full Gospel, supra*, is binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church’s ability to pay wages. Here, counsel’s is assertion that CIS should treat personal guarantees as evidence of the petitioner’s ability to pay, even though they would create an expense and a debt, whereas a parishioner’s pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the guarantees.

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well 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). Showing that the petitioner’s gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner’s net income figure, as stated on the petitioner’s corporate income tax returns, rather than the petitioner’s gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner’s net income in 2002 was \$8,909, which is lower than the proffered wage of \$41,600, and thus cannot demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date out of its net income.

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liquifiable asset typically used by business owners to pay its employees’ wages.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2002, however, were negative. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a net income of only \$8,909 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002 or subsequently.

In prior proceedings, counsel cited *Ranchito Coletero, supra*, for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. *Ranchito Coletero* involves a sole proprietorship and is not directly applicable to the instant petition, whose petitioner is structured as a corporation. Counsel also stated that another BALCA case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America, supra*, counsel states that this case stands for the proposition that an employer without sufficient profits to pay wages could still have the ability to pay where the company was showing increased sales and a major shareholder indicated a willingness to fund the company. Again, counsel does not state how DOL precedent is binding in these proceedings. Additionally, counsel also does not state that the BALCA panel in *Ohsawa America* considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, there is no evidence that the petitioner's revenues are increasing while its operating losses are decreasing, or that it has a shareholder willing to fund it. While the petitioner's owner claims it will use its \$80,000 equity in his personal residence, this is not typically the type of liquid asset used to bolster the financial standing of a business. In *Ohsawa America*, the shareholder willing to assist the petitioning entity had a personal net worth of \$4,000,000, in addition to the petitioning entity's increasing revenues

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

and decreasing operating losses. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Counsel also urges the application of *Matter of Sonogawa, supra*, which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

However, contrary to counsel's assertions, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d at 898, in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. at 715. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. The petitioner has submitted a letter stating that the beneficiary has already worked for him and is an indispensable human resource to his business. However, he failed to present documentation of the beneficiary's contributions or reputation. A handwritten note at the bottom of architectural drafts is not clear and convincing evidence that the beneficiary produced the drafts. One writer of a letter, for whom no official identification verification was provided, stated that the beneficiary designed new mantles "true to the historical periods" of the original room designs of their home. However, there is no objective verification of the beneficiary's contributions to that project from a writer whose identity has not been officially verified, and no proof the beneficiary was ever in the United States in an authorized status to work for the petitioner. No paystubs were provided or cancelled paychecks or other evidence pertaining to this point. It is also noted that no objective corroborating evidence was presented concerning the historical nature of the petitioner's customer's homes. None of the unnotarized letters state, nor was other evidence provided, that the petitioner's prospective customers would in fact hire the petitioner's business if the beneficiary were working for the petitioner. Likewise, unaccepted bids for work do not evidence contracts foregone with a nexus to the beneficiary's employment. The speculative hypothesis that the beneficiary would increase the petitioner's revenues cannot be concluded to outweigh the evidence presented in the corporate tax returns. Finally, the AAO concurs with the director that showing a future ability to pay the proffered wage fails to establish the petitioner's continuing ability to pay the proffered wage at the time it filed the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition

may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 or subsequently. Therefore, the petitioner has not established that it 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.