

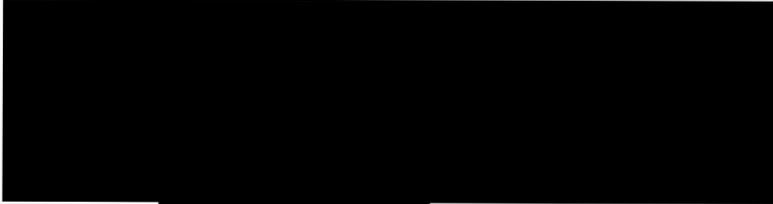
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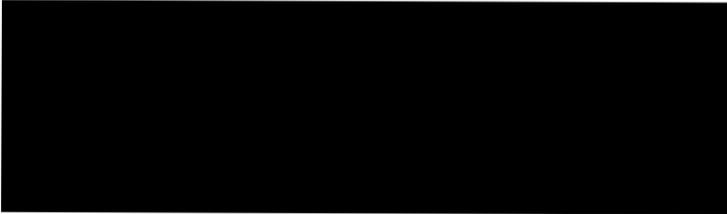


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAR 21 2006  
EAC 03 251 53829

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 service center director denied the employment-based visa petition, and the matter 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 Mediterranean cook. 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. The director further noted that the petition was filed under the professional/skilled worker category but that it was more accurately an “other” worker.

On appeal, counsel states that the director should have issued a request for further evidence prior to denying the petition. Counsel submits a brief and additional documentation.

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.

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 not available in the United States.

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

(ii) Other documentation--

(D) *Other Worker*. If the petitioner 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.

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 December 26, 2004. The proffered wage as stated on the Form ETA 750 is an annual salary of \$27,400. 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 November 1999, to have five employees, a gross annual income of \$592,673 and an annual net income of \$29,000. In support of the petition, the petitioner submitted a letter of employment from [REDACTED] Karachi, Pakistan, that stated the beneficiary worked for them as a Mediterranean cook from 1992 to 2000. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001 and 2002. These two documents indicated that in 2001 the petitioner had ordinary income of -\$7,408, and that in 2002, the petitioner had ordinary income of -\$8,573. The petitioner also submitted a balance sheet and a profit and loss statement for both tax years. Both tax returns indicate that the petitioner has one shareholder, Dr [REDACTED]

In a cover letter to the petition, counsel stated that the petition was for a skilled worker. With regard to the petitioner's tax returns, counsel stated that petitioner took depreciation deductions, which on paper reduced its net income. Counsel further stated that the petitioner's net income, without the depreciation deduction taken, results in a net income of \$40,915. Counsel stated that in tax year 2002, the petitioner's net income, without the depreciation deductions being taken, is \$28,657. Based on these positive net incomes, counsel states that the petitioner has sufficient and continued ability to pay the proffered wage of \$24,700.

On July 26, 2004, the director denied the petition. The director examined the petitioner's 2001 and 2002 income tax returns and noted the petitioner's negative ordinary income for both tax years. The director also examined the Schedules L that accompanied the returns, and stated that the petitioner's current liabilities exceeded its current assets in both years. Specifically the director stated that in 2001 the petitioner's current liabilities exceeded its current assets by \$6,880, and the petitioner's current liabilities in 2002 exceeded its current assets by \$1,966. With regard to the petitioner's balance and profit and loss statements, the director stated that these documents were internally generated unaudited or reviewed financial statements. As such, the director stated that limited reliance could be placed on the statements. Finally, the director stated that the Form ETA 750 indicates that the proffered position only requires one year of experience. The director stated that, based on the Form ETA 750, the petition did not meet the requirements for classification in the professional/skilled worker category, and the petitioner may be classifiable as "other worker".

On appeal, counsel submits the following documents:

An undated letter written by [REDACTED] Relationship Banker, Branch Bank & Trust Company, Reston, Virginia, that states that [REDACTED] and [REDACTED] had a home equity line of credit since January 2003 for \$200,000. The letter writer added that currently \$104,458.22 was available in the line of credit.

A memorandum signed by [REDACTED] GPS Financial Services, Burke, Virginia. This memo accompanies a profit and loss statement for the period of time January to December 2002. [REDACTED] states the statement does not contain the non-cash expenses of depreciation and amortization, and thus the figures represent the petitioner's true income.

Bank statements for the petitioner's Chevy Chase Bank account from March 2001 to September 2002.

A letter from the sole shareholder that states the shareholder personally guarantees the beneficiary's wage, even if it means using personal funds or resources because the beneficiary's employment will bring the petitioner immediate production value and will increase profit margins.

Bank statements for the sole shareholder's joint personal banking account from BB&T Bank, Vienna, Virginia, from February 2003 to December 2003.

Bank statements for the sole shareholder's home equity line of credit with another BB&T bank in North Carolina.

The petitioner's sole shareholder's Forms 1040, Individual Income Tax Return, for tax years 2001, and 2002.

Statements from Ameritrade Plus, an investment firm, that lists the petitioner's sole shareholder's money market funds.

The petitioner's sole shareholder's state of Virginia income tax return for tax year 2001.

The petitioner's Form 1120S, corporate income tax return for tax year 2000. This tax return indicates the petitioner had ordinary income of -\$32,612.

On the Form I-290B, counsel states the petitioner has other sources of income to demonstrate its ability to pay the proffered wage, but that the director did not issue a request for further evidence giving the petitioner an ability to submit additional documentation. Counsel also states that [REDACTED] because of a typographical error, the beneficiary was identified as a skilled worker and that the petitioner seeks to amend the petition and submit it as an "other worker" category. In its brief, counsel questions the director's analysis of the petitioner's liabilities and assets, as outlined on the Schedules L submitted by the petitioner. Counsel reiterates that the petitioner in the initial petition requested that CIS add back to the petitioner's income the amount of its depreciation deduction. Counsel states that the petitioner is submitting audited financial statements, profit and loss statements, and cash flow statements that will establish the amounts attributable to deductions for depreciation and amortization of goodwill are still in the petitioner's possession.

Counsel then examines the juridical history of the concept of the amortization of good will and depreciation of equipment and assets as it pertains to tax law and IRS regulations. Counsel in sum states that goodwill and

depreciation deductions do not reflect actual yearly expenditures, and therefore the amount of deduction is available to pay other expenses, such as the beneficiary's salary.

Counsel also addresses whether CIS has to rely solely on the net income shown on the tax return to determine the petitioner's ability to pay a salary. Counsel states that several cases cited by the director are district court decisions that are not binding precedent on the Board of Immigration Appeals. Counsel examines several cases affirmed by U.S. District Courts that involve the issue of depreciation. Counsel states that since the case of the instant petition arises in the Second Circuit, Ninth and Seventh Circuit decisions are merely persuasive and not binding on the petitioner's petition. Counsel does note that *Matter of Sonegawa*, 12 I & N. Dec. 612 (BIA 1967) is binding on CIS, and that in this decision the court held that a tax return showing insufficient income for the year prior to the filing of the visa petition did not in itself preclude the petitioner from establishing that she could pay the proffered salary through other documentation. Counsel also notes that not only does the BIA accept additional evidence to establish ability to pay, but the regulations mention annual reports, audited financial statements, profit/loss statements, bank account records, or personnel records as evidence in addition to federal tax returns. 8 C.F.R. § 204.5(g)(2). Counsel states that it is not the obligation of CIS on its own volition, to add back the non-cash deduction to the petitioner's net income figures; however the CIS is obliged to consider documents other than the federal tax returns when considering the petitioner's ability to pay the proffered salary.

On appeal, counsel states on Form I-290B that the petitioner through typographical error identified the beneficiary as a skilled worker, and that the petitioner wishes to change the category under which the I-140 petition is submitted, from that of "skilled worker" to that of "other worker." The AAO concurs with the director's finding with regard to the proper I-140 classification for the instant petition, and notes that the petitioner may without prejudice identify the proffered position as "other worker" in any subsequent petitions in which the instant Form ETA 750 is utilized.

With the initial petition and on appeal, counsel submits unaudited profit and loss statements. On appeal, counsel submits a letter and a brief financial report that omits the depreciation and amortization expenses. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The letter submitted by [REDACTED] on appeal is not presented as an audit of the petitioner's financial resources. Thus, the AAO cannot conclude that the profit and loss statement submitted on appeal is an audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank accounts is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income

(income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel also submits bank statements for the petitioner's sole shareholder. 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."

Although the petitioner's sole shareholder states that she is willing to pay the petitioner's wage out of her personal assets, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Likewise, the sole shareholder's home equity line of credit may not be considered when examining the petitioner's ability to pay the proffered wage. First, the line of credit which is documented in the record is not the petitioner's but rather its sole shareholder's line of credit. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Even if the line of credit were the petitioner's, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also states that depreciation and amortization deductions should be added back to the petitioner's net income. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

Although counsel states that circuit court decisions such as *K.C.P. Food, Inc. V Sava*, are not binding on the instant petition because they are not binding on the BIA and because the jurisdiction for the petition is the 2<sup>nd</sup> Circuit Court, this statement is without merit. The present proceedings are administrative in nature. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. Regardless of what circuit jurisdiction in which the petition is filed, the AAO follows the Act, regulatory guidance, and BIA decisions in its deliberations. It also looks to the Circuit Courts for persuasive guidance. While the findings of a decision in one Circuit Court are not binding on all Circuit Courts, the AAO and CIS adjudicators apply the law of the circuit court to which the decision ultimately would be appealed, if litigated. In addition, the AAO and other CIS adjudicators may use a Circuit Court decision as guidance especially in jurisdictions in which no countervailing court findings prevail.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 2001 and onward.

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. Contrary to counsel's assertions, CIS examines the net income figure without consideration of depreciation or other expenses, including the amortization of good will. 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. It is noted that the petitioner, on appeal, submitted its federal income tax return for 2000. Since the priority date is January 2001, the petitioner's federal income tax return for 2000 is not dispositive. Therefore, only the petitioner's 2001 and 2002 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: -\$7,408 in 2001 and -\$8,573 in 2002. These figures fail to establish the ability of the petitioner to pay the proffered wage.

Nevertheless, as counsel asserts, 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>1</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 submitted the following information for tax years 2001 and 2002:

|                     | 2001      | 2002      |
|---------------------|-----------|-----------|
| Ordinary Income     | \$ -7,408 | \$ -8,573 |
| Current Assets      | \$ 42,054 | \$ 3,108  |
| Current Liabilities | \$ 48,934 | \$ 5,074  |
| Net current assets  | \$ -6,880 | \$ -1,966 |

These figures fail to establish the ability of the petitioner to pay the proffered wage. In 2001, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net

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<sup>1</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.

income of -\$7,408 and net current assets of -\$6,880, 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 it paid the full proffered wage to the beneficiary in 2002. In 2002, the petitioner shows a net income of -\$8,573 and net current assets of -\$1,966, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

As noted previously, the assets of the shareholders, including bank accounts and lines of credit are not viewed as corporate assets. The AAO also does not consider the depreciation deductions and amortization of good will when examining the petitioner's net income. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

On appeal, counsel refers to *Matter of Sonogawa*, and states that CIS should go beyond an examination of the petitioner's tax return and net income when viewing the petitioner's ability to pay the proffered wage. Counsel's reference to *Matter of Sonogawa* is not persuasive. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the 2001, the year in which the priority date was established, was an uncharacteristically unprofitable year for the petitioner. In fact, the documents in the record do not reflect that the petitioner has had a profitable year of business operations since its establishment.

The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. 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.