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U.S. Citizenship
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Services

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FILE: LIN 06 139 53705 Office: NEBRASKA SERVICE CENTER

Date OCT 21 2008

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing construction company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition based on the petitioner's federal tax returns and the beneficiary's W-2 Wage and Tax Statements submitted to the record. 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.

As set forth in the director's November 27, 2006 denial, the primary issue in this case is 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.

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 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$40,000 per year. The Form ETA 750 states that the position requires eight years of grade school and three years of work experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief and a letter dated January 12, 2007 from [REDACTED], the petitioner's accountant.

[REDACTED] states that although the petitioner offered wages, as stated on the ETA Form 750 of \$40,000, in 2001, the beneficiary fell and broke his leg and was out of work for almost six and a half months. In 2002, [REDACTED] stated that the beneficiary was unable to work for three months, as he needed to take care of his elderly mother who was sick in bed. In tax year 2003, [REDACTED] continues, one of the petitioner's projects received an Asbestos Abatement OSHA violation and work was stopped for two and a half months until the violation was cleared up. In tax year 2004, [REDACTED] stated the beneficiary took time off for personal and undisclosed reasons. [REDACTED] then states that for these reasons, the beneficiary was not paid the proffered wage of \$40,000. [REDACTED] notes that in tax year 2005, the beneficiary received \$55,947 and in tax year 2006, he received \$54,463. [REDACTED] refers to the case law referenced by the director in his decision and states that the petitioners in these decisions appeared to be restaurants or in the food-related business. Mr. [REDACTED] notes that it is not clear from these decisions whether there were alternative and more accurate information available to determine the petitioner's financial abilities.

[REDACTED] further notes, that as he stated previously, construction companies have a much greater disparity between tax and "real" income (as allowed by law) than restaurant or food related industries. [REDACTED] further stated that the director's use of the petitioner's Schedule L as the acceptable balance sheet for the petitioner also leads to a gross understatement of the petitioner's value. [REDACTED] states that the director **must admit that accounts receivable are an acceptable asset.**² [REDACTED] notes that if the director looked at the present financial statement he would see accounts receivable and yet there are no accounts receivables on the Schedule L. This omission along with other assets that are not shown on the cash basis tax return as approved by the IRS leads to a very misleading tax return. [REDACTED] states that the petitioner's financial statement for the year ending June 30, 2006 shows net current assets of \$1,126,540, which is a substantial difference from the director's calculation of the petitioner's net current assets.

[REDACTED] also states that the director lists what he terms "acceptable" assets less "acceptable" liability to determine the petitioner's net current assets.³ [REDACTED] states that if only the petitioner's receivables and cash are used as acceptable assets and notes payable and accounts payable are used as "acceptable liabilities" the results would be net current assets for the petitioner of \$551,448 in tax year 2001, \$660,299 in tax year

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).

² The AAO will more fully discuss its analysis of the petitioner's assets when it examines the petitioner's ability to pay the proffered wage based on its net income or net current assets further in these proceedings. The AAO does not solely view the petitioner's accounts receivables in its analysis.

³ The AAO does not utilize the word "acceptable" in its analysis of the petitioner's ability to pay the proffered wage, but rather describes the relevant figures to be examined as the petitioner's current assets or liabilities.

2002, \$860,895 in 2003, \$964,987 in 2004, \$963,808 in 2005 and \$812,879 in tax year 2006. [REDACTED] notes that comparing these figures to the director's figures shows the vast difference the accounting methods will generate. [REDACTED] concludes by referring to his initial letter and stating that if the director checked with anyone involved with the financial analysis of construction companies in particular banks and surety companies, the director would learn that the petitioner's tax returns are the worst indicator of its financial status. [REDACTED] states that his opinion is borne out by the increase in both credit and bonding lines that the petitioner has enjoyed during the period that the director claims the petitioner cannot afford to pay a \$40,000 salary.

With the initial petition, the petitioner submitted the petitioner's Forms 1120, U.S. Corporation Income Tax Return for tax years 2001 to 2005. The petitioner also submitted copies of its checking account statements from May 31, 2001 to February 28, 2006 from three successive banks: Atlantic Bank, Interbank of New York, and Marathon Bank.⁴ The petitioner also submitted its financial statement dated December 31, 2005. This document refers to the accountant's review report and contains special breakout sheets that document the petitioner's ongoing contracts as well as completed contracts.

In response to the director's request for further evidence (RFE) dated August 7, 2006, the petitioner submitted the beneficiary's IRS Forms 1099-MISC for tax years 2001 to 2005. These documents indicated that the beneficiary received the following non-employee compensation: \$18,885.86 in tax year 2001; \$29,321 in tax year 2002; \$31,015 in tax year 2003; \$35,908 in tax year 2004; and \$45,947 in tax year 2005. The petitioner also submitted the following additional evidence:

A copy of the petitioner's financial statements ending on June 30, 2001; June 20, 2002; June 30, 2003; June 30, 2004; and June 2005 with accompanying accountant's review reports written by [REDACTED]; and

Copies of checking account statements from Marathon Bank from January 31, 2006 to September 29, 2006;

The petitioner also submitted a letter from [REDACTED], the petitioner's accountant dated October 20, 2006. In his letter, [REDACTED] stated that he was part of a peer review program undertaken by the American Institute of Certified Public Accountants (AICPA), and that during the last peer review session, the petitioner was one of the companies selected for examination. [REDACTED] further stated that for the construction industry, financial statements must be prepared using the percentage of completion method of accounting for revenue recognition. [REDACTED] stated that means that for each construction project, the gross profit must be determined at the outset of the project, and then the profit is recognized based on the percentage of the projected total costs that are incurred during the period. [REDACTED] stated that this is the only accepted method for revenue recognition of financial statement for construction contractors, since it is the most accurate method. The rest of [REDACTED]'s letter is repeated in the contents of his January 14, 2007 letter.

The petitioner also submitted a letter written by [REDACTED], Attorney-in-Fact, dated October 23, 2006 that stated the company is willing to give the petitioner favorable consideration on a bond request for a single program up to \$2 million dollars. Finally the record contains two additional letters from banks stating the petitioner's current line of credit limits. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

⁴ Only the petitioner's November 2005 bank statement from Marathon Bank is contained in the record.

On appeal, counsel states that the petitioner is involved in general contracting for governmental, institutional and commercial buildings and that this work is primarily performed under fixed price contracts. Counsel states that the length of the petitioner's contracts varies but typically ranges from one to three years. Counsel states that the pertinent Citizenship and Immigration Services (CIS) regulations with regard to the petitioner's ability to pay the proffered wage require the submission of either the petitioner's annual reports, federal tax returns or audited financial statements.

Counsel states that petitioner has provided two types of evidence, in apparent reference to the petitioner's federal tax returns and financial statements. Counsel also notes that pertinent CIS regulations provide that in appropriate cases additional evidence, such as profit/loss statements, bank accounts records, or personnel records may be submitted by the petitioner. Counsel then states that the director decided to rely only on the petitioner's tax returns to establish its ability to pay the proffered wage, which is in violation of the law.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1991, to have gross annual income of \$511,967, net annual income of \$97,627, and to currently employ sixteen workers. The petitioner's tax returns indicate that the petitioner's filing year runs from July 1, to June 30, thus the petitioner's federal tax return for tax year 2000 is relevant to this proceeding. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner since November 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, CIS 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

With regard to the counsel's or the petitioner's accountant's assertions with regard to the petitioner's financial statements submitted to the record, 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. 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 account 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

In response to the director’s RFE and on appeal, counsel and the petitioner’s accountant referred to the petitioner’s credit line as a basis for establishing the petitioner’s ability to pay the proffered wage. 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 petitioner 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).

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 has established that it employed and paid the beneficiary during the relevant period of time the following amounts of compensation: \$18,885.86 in tax year 2001; \$29,321 in tax year 2002; \$31,015 in tax year 2003; \$35,908 in tax year 2004; and \$45,947 in tax year 2005.⁵ Therefore the petitioner established its ability to pay the proffered wage of \$40,000 in tax year 2005 based on the beneficiary’s compensation. However, the petitioner did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and through tax year 2004. Thus the petitioner has to establish its ability to pay the

⁵ The director did not request nor did the petitioner provide any Form 1099-Misc to document the beneficiary’s compensation during tax year 2000, a period of time that includes the April 30, 2001 priority date. Therefore the AAO cannot determine whether the petitioner paid the beneficiary the proffered wage as of the priority date.

difference between the beneficiary's actual wages and the proffered wage from the 2001 priority year through tax year 2004 based on its net income or net current assets.

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is 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 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 Chang*, 719 F. Supp. at 537.

With regard to the instant petition, the priority day of April 30, 2001 would be represented by the petitioner's 2000 fiscal year tax return that runs from July 1, 2000 to June 30, 2001. The petitioner did not submit its 2000 tax return to the record. Therefore the AAO cannot determine whether the petitioner had sufficient net income or net current assets as of the April 2001 priority date to pay the difference between the beneficiary's actual compensation and the proffered wage as of the priority date. Nevertheless, the AAO will examine the remainder of the petitioner's tax returns submitted to the record. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,000 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁶ of \$6,556.⁷

⁶The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁷ In his decision, the director incorrectly utilized line 30 of the petitioner's Form 1120 to establish the petitioner's net income of \$0(zero) in tax year 2001. The AAO withdraws that part of the director's decision as incorrect.

- In 2002, the Form 1120 stated a net income of -\$11,019.
- In 2003, the Form 1120 stated a net income of \$10,250.
- In 2004, the Form 1120 stated a net income of -\$156,717

Therefore, for the year 2003, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages of \$31,015 and the proffered wage of \$40,000 based on its net income of \$10,250. The AAO withdraws the director's analysis of the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2003. Nevertheless, the petitioner cannot establish its ability to pay the difference between the beneficiary's actual compensation and the proffered wage of \$40,000 in tax years 2001, 2002, or 2004 based on its net income.

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. Contrary to the petitioner's accountant's assertions, the AAO does not use [REDACTED] suggested analysis of accounts receivable and cash as the petitioner's assets and notes payable and accounts payable as acceptable liabilities in determining the petitioner's net current assets.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ 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 net current assets during 2001 were -\$153,137.
- The petitioner submitted no Schedule L for tax year 2002.
- The petitioner's net current assets during 2004 were -\$233,343.

Therefore, for the years 2001 and 2004, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's compensation and the proffered wage. The petitioner failed to submit regulatory-prescribed evidence of the petitioner's ability to pay the proffered wage in 2002. Thus the petitioner has not established its ability to pay the difference between the beneficiary's actual compensation and the proffered wage in tax year 2002, based on its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as

⁸According 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.

of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for tax years 2003 and 2005.

Counsel on appeal states that the beneficiary worked five and a half months in 2001, while [REDACTED], the petitioner's accountant, states on appeal that the beneficiary broke his leg in the 2001 priority year and was out of work for almost six and half months and noted other periods of time in tax years 2002, 2003, and 2004 during which the beneficiary did not receive the full compensation of \$40,000. However, [REDACTED] assertions are not substantiated any further with any evidentiary documentation, such as medical records for 2001 to further establish these assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the AAO does not equate the beneficiary's ability to work necessarily with the petitioner's ability to pay the proffered wage. The establishment of the petitioner's ability to pay the proffered wage through an examination of the beneficiary's wages or compensation is one of three possible analysis paths in examining the petitioner's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner 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.