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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

B6

FILE: [REDACTED]  
SRC 07 088 51511

Office: TEXAS SERVICE CENTER Date: APR 17 2009

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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.

John F. Grissom  
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 The director's decision will be withdrawn, and the appeal will be sustained.

The petitioner is an architectural firm. It seeks to employ the beneficiary permanently in the United States as an architect. 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 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original June 30, 2008, the single 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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is November 16, 2001. The proffered wage as stated on the Form ETA 750 is \$19.18 per hour or \$39,894.40 annually.

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 appeal<sup>1</sup>.

Relevant evidence submitted on appeal includes counsel's brief; a copy of the sole proprietor's personal expenses for the years 2001 through 2007; copies of the sole proprietor's 2001 through 2007 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business; copies of the sole proprietor's bank statements for the years 2002 through 2004 and for part of the years 2005 through 2007; a copy of an appraisal for the property at [REDACTED] as of July 10, 2001; a copy of a mortgage payment for the property at [REDACTED]; a copy of a credit line with Chase Bank; an appraisal for a property at [REDACTED] as of November 24, 1997; a copy of a mortgage payment for the property at [REDACTED]; copies of several internet articles evidencing the sole proprietor's expertise in his field; a resume of the petitioner's architecture only projects; a resume of the petitioner's completed design/build projects; and a copy of the 2007 Form 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The sole proprietor's 2001 through 2007 Forms 1040 reflect adjusted gross incomes of \$168,976, \$51,337, \$27,646, \$43,012, \$56,441, \$86,438, and \$195,168, respectively.

The 2007 Form 1099-MISC, issued by the petitioner on behalf of the beneficiary, reflects wages paid to the beneficiary of \$39,545 in 2007.

The sole proprietor lists his 2001 through 2007 yearly expenses as \$34,725.93, \$50,584.44, \$47,807.51, \$52,767.42, \$55,631.33, \$51,796.90, and \$42,092.42, respectively.

The sole proprietor's property at [REDACTED] was valued at \$1,350,000 as of July 10, 2001.

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

The sole proprietor's property at [REDACTED] was valued at \$885,000 as of November 24, 1997.

The statement from Chase Bank shows that the sole proprietor has a line of credit of \$150,000 with \$110,000 left on the line of credit as of August 15, 2008.

The sole proprietor's bank statements reflect balances from a low of \$3,732.54 to a high of \$229,756.38.

On appeal, counsel states:

In its I-140 decision, the USCIS claimed that the information on the petitioner's "cash flow record" previously submitted was incomplete. Baselessly, the USCIS further asserted that "cash flow record which does not include all of the family personal expenses for housing transportation, etc. does not suffice as evidence." See Exhibit 2.

Obviously, the USCIS failed to carefully and thoroughly review the evidence the petitioner had submitted in response to the Request for Evidence notice. What the petitioner had provided included all of the sole proprietor's personal family expenses. In fact, the statement from [the sole proprietor], Principal and Owner of [the petitioner], explained how to interpret the lists enclosed. Exhibit 5.

The list titled "[REDACTED] and [REDACTED] Personal (Non-Tax Return) Expenses (Cash Out) and Net Cash Flow, January 2001 through December 2007" contains, in its 1<sup>st</sup> page, a summary of [REDACTED] net cash flow from year 2001 through 2007. It should be noted that the couple received from their parents [a] cash gift in the amount of \$20,000 each relevant year except for year 2003.

The list's 2<sup>nd</sup> and 3<sup>rd</sup> pages are details of [REDACTED] all personal household expenses. The employer contends that these lists contain all of his personal expenses, and that his family did not incur any expenses other than those specified for the years in dispute.

\* \* \*

Consequently, [the petitioner] did not show ability to pay the proffered wage in years 2002 through 2006 based solely on [the sole proprietor's] Form 1040s and his personal expenses lists.

However, the totality of the circumstances affecting the petitioner's ability to pay the proffered wage should be considered under the principles of *Matter of Sonogawa*, 12 I. & N. Dec. 612 (Reg. Comm. 1967). Where a petitioner is a sole proprietorship, the relevant tax returns are Form 1040 individual tax returns of the petitioner's owner,

which does not include balance sheets showing the assets and liabilities of the taxpayer. Consequently, any separate evidence of the assets and liabilities of the petitioner's owner which does not duplicate information already found on the Form 1040 tax returns should be considered.

One particular cash inflow in the amount of \$20,000 received by the owner's family in all relevant years except for year 2003 was not reflected in [the sole proprietor's] income tax returns but listed in his personal cash flow table because it is a gift exempt from tax and therefore does not need to be included in the donee's income tax returns. Nevertheless, this amount has an effect on the petitioner's ability to pay the proffered wage and therefore should be taken into account. See Exhibit 5.

In addition, bank statements of both [the petitioner] and [redacted] should be given proper weight. Exhibit 7. Appendix B contains tables showing the bank accounts balances of [redacted] since 2002.

The sole proprietor has also built up substantial equity in the real property he owns. The property located at [redacted] is [redacted] residence, which possessed an estimated market value of \$1,350,000 in 2001. Exhibit 8. As of June 2008, the unpaid principal balance for this property was \$579,276.25, and the home equity line of credit available for use totaled \$110,000. Exhibit 9 and Exhibit 10.

The rental property the family owns in Oakland, CA had an estimated market value of \$885,000 in 1997, while comparable properties listed in the neighborhood in summer 2008 were asking for at least \$1,947,500. Exhibit 11 and Exhibit 12. As of June 2008, the unpaid principal balance for this property was \$478,823.51. Exhibit 13.

\* \* \*

Since its inception, [the petitioner] has been specialized in luxury residential property design from its offices in Northern and Southern California. . . .

[redacted] was the subject of numerous articles in a variety of architecture and design magazines. His current projects include an 18<sup>th</sup> Century French-style limestone chateau in Newport Beach, CA and a modern "California organic" home in [redacted]. Similar to the sole proprietor in *Sonegawa*, [redacted] has enjoyed a high level of recognition and popularity among his previous and existing customers, which will contribute to his continuous success in his field.

On appeal, counsel further contends that the petitioner is “only required to prove it could pay the salary on a *pro rata* basis beginning from the priority date of November 16, 2001.” Counsel cites a non-precedent decision in support of his contention.<sup>2</sup>

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, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner’s ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on November 12, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted a 2007 Form 1099-MISC, issued by the petitioner on behalf of the beneficiary, which shows that the beneficiary was employed by the petitioner in 2007. Therefore, the petitioner has established that it employed the beneficiary in 2007, but not in 2001 through 2006.

Since the beneficiary was not employed by the petitioner in 2001 through 2006, the petitioner is obligated to establish that it had sufficient funds to pay the entire proffered wage of \$39,894.40 in 2001 through 2006. The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$39,894.40 and the actual wages paid to the beneficiary of \$39,545 in 2007. That difference is \$349.40.

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<sup>2</sup> Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. In addition, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as 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 federal case law. *See 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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. [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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The petitioner is organized as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7<sup>th</sup> Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of four in 2001 through 2007. The sole proprietor's adjusted gross incomes in 2001 through 2007 were \$168,976, \$51,337, \$27,646, \$43,012, \$56,441, \$86,438 and \$195,168, respectively. In 2001 through 2007, the sole proprietor claims that his yearly personal expenses were \$34,725.93, \$50,584.44, \$47,807.51, \$52,767.42, \$55,631.33, \$51,796.90, and \$42,092.42, respectively. When combining the sole proprietor's yearly personal expenses and the proffered wage of \$39,894.40 for the years 2001 through 2006, the result is \$74,620.33, \$90,478.84, \$87,701.91, \$92,661.82, \$95,525.73, and \$91,691.30, respectively. When combining the sole proprietor's 2007 yearly personal expenses and the difference of \$349.40 between the proffered wage of \$39,894.40 and the actual wages paid to the beneficiary in 2007 of \$39,545, the result is \$42,441.82. Therefore, the sole proprietor has established its ability to pay the proffered wage in 2001 and 2007 from his adjusted gross income, but not in 2002 through 2006.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage based on a yearly tax-free gift of \$20,000, its bank statements, its equity in real property, its income expectations, and on the totality of the circumstances.

With regard to the sole proprietor's claim that he received a yearly tax-free gift of \$20,000, the sole proprietor has not submitted any evidence which corroborates his claim. 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)). Therefore, the AAO will not consider the sole proprietor's yearly tax-free gift of \$20,000 when determining the petitioner's ability to pay the proffered wage of \$39,894.40.

With regard to the sole proprietor's bank statements, most of those bank statements are in the name of the sole proprietor's spouse. There is no indication that the sole proprietor's spouse has an interest in the petitioning entity or that the sole proprietor has access to those funds. Had the sole proprietor provided evidence that he had access to those funds, he would have established his ability to pay the proffered wage of \$39,894.40 as the balances in those accounts were more than enough to pay the proffered wage and his personal recurring expenses in 2002 through 2006.<sup>3</sup>

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<sup>3</sup> It is noted that the sole proprietor has a line of credit of \$150,000 (\$110,000 left on the line of credit) as of August 15, 2008. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the sole proprietor'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 were 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

The AAO does note, however, that later bank statements (2008) are in the sole proprietor's name, and documentation shows that the bank account statements for each year could support payment of the family's expenses leaving the sole proprietor's adjusted gross income to pay the proffered wage. In addition, the sole proprietor's 2001 tax return exhibits sale of an Annapolis, Maryland property leaving large amounts of cash accessible. The sole proprietor's tax returns also reflect additional interest earned on cash.

With regard to the sole proprietor's equity in his real property, the real property at the petitioner's premises are considered to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary as they are not easily converted into cash. Therefore, the AAO will not usually consider the real property of the petitioner's premises or the sole proprietor's personal residence when determining the petitioner's ability to pay the proffered wage of \$39,894.40.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

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*Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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, USCIS 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, USCIS 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).

As in *Matter of Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, the Form I-140 indicates the petitioner was established in 1985 (24 years). The petitioner has provided tax returns for the years 2001 through 2007 with its 2001 and 2007 returns clearly establishing the petitioner's ability to pay the proffered wage of \$39,894.40. In addition, the petitioner has submitted several articles that show that the petitioner is highly regarded in its field and that its expectations of continued business growth and increasing profits are reasonable. The articles and sample project listing submitted reflect that the petitioner works on unusual and high-end projects, "extravagant mansions and luxurious Malibu bungalows" and is now moving into "green design" building homes in [REDACTED]. The sole proprietor's tax returns also reflect payments for contracted services on an annual basis. Therefore, in light of the petitioner's long and continuing business presence (more than 24 years), its well documented reputation in the field, and its continued positive net profits, as well as the sole proprietor family's substantial cash assets through which the family can support itself, the AAO finds that the petitioner could pay the proffered wage from the priority date and continuing to the present.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's tax returns and other evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

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 been met.

**ORDER:** The appeal is sustained. The director's decision of November 1, 2006 is withdrawn. The petition is approved.