

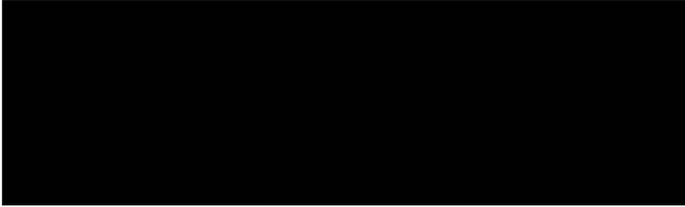
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U.S. Citizenship
and Immigration
Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: **JAN 02 2009**
WAC 06 046 53341

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a toys and component parts importing and exporting company. It seeks to employ the beneficiary permanently in the United States as a marketing analyst. 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 2002 priority date of the visa petition. 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.

The AAO will first examine the issue raised by the director in her decision, namely whether the petitioner had the ability to pay the proffered wage as of the 2002 priority date and onward. The AAO will also comment on the issues raised in a Notice of Derogatory Information sent to the petitioner.

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. . . . 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].

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).

In the instant matter, the Form ETA 750 was accepted on October 11, 2002. The proffered wage as stated on the Form ETA 750 is \$26.65 per hour, \$55,432 per year. The Form ETA 750 states that the position requires a bachelor's degree in either business administration or marketing, and either one year of experience in the proffered job or one year of experience in the related occupation of import-export marketing analyst, import-export manager, import-export trader, or a related import-export marketing occupation.

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 relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence submitted on appeal includes counsel's brief. Counsel also submits a copy of the petitioner's 2005 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, with relevant schedules and attachments.² Further, counsel submits complete copies of the petitioner's Forms 1120S for tax years 2002 to 2004,³ along with copies of the petitioner's W-2 Forms for all employees, including the beneficiary, for tax years 2002, 2004, 2005, and 2006. The beneficiary's W-2 Forms indicate that the petitioner paid the beneficiary \$16,592 in 2002, \$8,500 in 2004, \$13,000 in 2005, and \$20,800 in 2006. In response to the director's RFE, the petitioner submitted copies of its Forms 941, Employer's Quarterly Federal Tax Form, for all four quarters of tax year 2005 that reflect wages for four employees. In addition, counsel submitted a copy of an excerpt from

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 record of this proceeding closed with the submission of the petitioner's response to the director's NOID received by the Texas Service Center on August 16, 2006. Therefore this tax return was not previously submitted to the record and constitutes new evidence.

³ The AAO notes that the director requested the petitioner's tax returns in his RFE dated April 7, 2006 for tax years 2003, 2004, and 2005, and did not request the petitioner's tax return for the 2002 priority year. In the director's NOID, the director then requested the petitioner's federal tax returns for tax year 2002, 2004 and 2005. Although the director in his denial of the petition stated he requested **complete** copies of the petitioner's tax return in the NOID, the record does not reflect this specific request. (Emphasis added.) Thus, the AAO will accept the complete copies of the petitioner's tax returns submitted on appeal as new evidence.

an unpublished AAO decision that references the ability of shareholders of a C or S corporation to allocate expenses of the corporation for various legitimate business purposes, including the reduction of the corporation's taxable income, thus, the corporation's compensation of officers may be considered additional financial resources in addition to the petitioner's figures for net income.

In response to the director's NOID, the petitioner submitted copies of its Bank of America checking account from February 28, 2005 to July 1, 2006; copies of the petitioner's IRS Forms 940-EZ, Employer's Annual Federal Unemployment Tax Return (FUTA), for tax years 2002 to 2005; and a copy of IRS Form W-3, Transmittal of Wage and Tax Statements, for tax years 2003 to 2005. The W-3 Forms indicate the petitioner paid wages of \$136,000 in the 2005 calendar year, \$112,750 in tax year 2004, \$87,250 in 2003, and \$85,092 in wages during the 2002 tax year. The petitioner also submitted the petitioner's⁴ Bank of America statements from February 28, 2005 to July 1, 2006; and an IRS Form 7004, Application for Automatic 6-Month Period of Time to File Certain Business Income Tax, Information, and Other Returns, for the petitioner's 2005 tax return.

In response to the director's RFE, counsel submitted an excerpt from an unpublished AAO decision that referred to the authority of sole shareholders of S and C Corporations to allocate corporate expenses to reduce the corporation's taxable income. The decision also stated that officer compensation might be considered as additional financial resources, in addition to the petitioner's figures for ordinary income. In response to the director's NOID, counsel submitted a letter dated August 9, 2006 and written by [REDACTED], the petitioner's president. In his letter, Mr. [REDACTED] stated that as the petitioner's sole shareholder, he has the authority to allocate the expenses of the petitioner and to distribute the petitioner's income to minimize the petitioner's taxable income. [REDACTED] further stated that using this authority he was granted a loan of \$84,000 by the petitioner in tax year 2004, and when this loan is added to the negative ordinary income figure of \$1,030 noted on line 21 of the petitioner's tax return, the petitioner had more than the \$55,432 necessary to pay the proffered wage. [REDACTED] also stated that additional items such as depreciation and other expense could be added to this sum to provide further proof of the petitioner's ability to pay the proffered wage. With regard to tax year 2003, [REDACTED] noted that the petitioner's tax return on line 21 showed ordinary income of \$63,830, which when added to the stated compensation of officers on line 7, resulted in \$133,830, a figure greater than the proffered wage. The record contains no other relevant evidence.

The petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1987, to have a gross annual income of over \$5,000,000, and to currently employ four workers. On the Form ETA 750, signed by the beneficiary on December 24, 2004, the beneficiary claimed to have worked fulltime as a marketing analyst for the petitioner since May 1997.

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

⁴ These statements indicate the petitioner's name and also the name of holder of the bank account.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In response to the director's RFE, counsel submitted the petitioner's Bank of America checking account statements to the record. The petitioner's reliance on the petitioner's checking account balances is 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 in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. On appeal, the petitioner submitted the beneficiary's W-2 Forms for tax years 2002, 2004, 2005, and 2006 to the record that indicate the petitioner paid the beneficiary \$16,592 in 2002, \$8,500 in 2004, \$13,000 in 2005, and \$20,800 in 2006. Thus the petitioner cannot establish it had the ability to pay the proffered wage through the wages it paid to the beneficiary as of the 2002 priority date and through tax year 2006. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$55,432 from either its net income or net current assets in tax years 2002, 2004, and 2005,⁵ and it has to establish its ability to pay the entire proffered wage in tax year 2003.

⁵ The difference between the beneficiary's actual wages and the proffered wage is as follows: \$38,840 in tax year 2002; \$46,932 in tax year 2004, \$42,432 in tax year 2005, and \$35,432 in tax year 2006. The AAO notes that the record closed as of the petitioner's response to the director's NOID dated July 19, 2006, and the petitioner's tax return for 2006 would not have been available at this date. Therefore the AAO will not examine the petitioner's net income or net current assets in tax year 2006, and will not comment further on the petitioner's ability to pay the proffered wage in tax year 2006.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax returns, 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 receipts and wage expense is misplaced. 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 USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$55,432 per year from the priority date:

In 2002, the Form 1120S stated a net income⁶ of -\$59,278.

⁶Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 31, 2008)

- In 2003, the Form 1120S stated a net income of \$63,830.
- In 2004, the Form 1120S stated a net income of -\$1,030.
- In 2005, the Form 1120S stated a net income of \$2,715.

Therefore, for the 2002 priority year and or tax years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage. However, the petitioner established its ability to pay the entire proffered wage of \$55,432 in tax year 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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, USCIS 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.⁷ 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. With regard to tax years 2002, 2004 and 2005, the petitioner's net current assets were as follows:

- The petitioner's net current assets during 2002 were -\$79,812.
- The petitioner's net current assets during 2004 were \$3,645.
- The petitioner's net current assets during 2005 were \$163,952.

(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income or deductions shown on its Schedule K for tax year 2002, the petitioner's net income is found on Schedule K, line 23 for tax year 2002. With regard to tax years 2003, 2004, and 2005, the petitioner did not have any additional income, deductions, credits or other adjustments, net income is found on line 21 of the Form 1120S.

⁷According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner established its ability to pay the difference between the beneficiary's actual wages in tax year 2005 and the proffered wage based on its 2005 net current assets. However, the petitioner did not have sufficient net current assets to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2002 or 2004. Therefore, from the date the Form ETA 750 was filed with the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or through the petitioner's net income or net current assets.

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. On appeal and in its response to the director's RFE, counsel and the petitioner's owner refer to the use of officer compensation to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. Counsel referred to a decision issued by the AAO concerning the issue of officer compensation utilized to establish the petitioner's ability to pay, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS 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).

USCIS (and legacy INS) has long held that it 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.

The AAO has examined the financial resources of officer compensation primarily with regard to sole shareholder personal services corporations. In doing so, the AAO does not suggest that the personal assets of a corporation's owners may be added to a corporation's assets to determine the corporation's ability to pay a wage, but rather considers the financial flexibility that the employer-owner has in setting his or her salary based on the profitability of his or her business. The petitions in which officer compensation has been examined as a source of additional financial resources usually involve corporations in which the shareholders/officers receive compensation significantly higher than the proffered wage.

In the instant petition, the officer compensation for the priority year 2002 is \$59,500, which is not significantly higher than the \$55,432 proffered wage. Although the officer compensation increases in tax years 2004 and 2005, it is not significant enough to establish the petitioner's financial ability to pay the proffered wage. Thus the AAO will not consider the use of officer compensation to pay the proffered wage in the instant petition.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Thus, the AAO concurs with the director's denial of the instant petition.

The AAO issued a Notice of Derogatory Information (NDI) on March 6, 2008, with regard to several issues beyond the decision of the director. These issues concerned whether the petitioner intended to employ the beneficiary on a full-time basis, whether the petitioner needed a full-time marketing analyst, and whether the beneficiary had properly maintained his H-1B status pursuant to the H-1B petitions that the petitioner has filed on his behalf.

The AAO noted that on Form ETA 750B, the beneficiary listed that he has been employed with the petitioner on a full-time basis since May 1997 as a marketing analyst, and that USCIS records reflected that the petitioner had filed the following I-129 H-1B petitions on the beneficiary's behalf: WAC-97-142-52168; WAC-03-164-50968; WAC-04-075-52356; and WAC-06-141-53592.

The AAO noted that the petitioner on appeal submitted the following W-2 statements on behalf of the beneficiary: 2002: \$16,592; 2003: no wages; 2004: \$8,500; 2005: \$13,000; and 2006: \$20,800. The AAO noted that the beneficiary's wages appeared to reflect payment for part-time work. The AAO stated that while the petitioner is not required to employ the beneficiary in the proffered position until the beneficiary is granted permanent residency, here two points are relevant: (1) the petitioner must show that the Form ETA 750 job offer is realistic from the time of the priority date; and (2) the beneficiary must properly maintain his nonimmigrant status to later adjust to permanent residence. *See* 8 C.F.R. § 245.1(b)(10).

As the wages appear to exhibit part-time employment, the AAO requested that the petitioner provide documentation to demonstrate that the marketing analyst position represented on the Form ETA 750 is a full-time position, and that the petitioner can demonstrate the need for a full-time analyst from the priority date of October 11, 2002.

In response, the petitioner submitted copies of its I-129 petitions for the beneficiary for initial and continuing H-1B status that identify the following periods of time and work status: full-time work at \$15.00 an hour for the I-129 petition filed for May 5, 1997 to May 5, 2000; part-time work for 30 hours a week at \$16.26 per hour from May 5, 2000 to May 5, 2003; part-time work for 35 hours a week at \$13.90 per hour from May 5, 2003 to March 31, 2004; part-time work for 35 hours a week at \$15.34 per hour for the period from March 31, 2004 to March 31, 2005; and full-time work at \$16.53 per hour for the period from March 31, 2006 to March 31, 2007.

In response to the NDI, counsel stated that the petitioner did not file successive full-time H-1B petitions for the beneficiary. Counsel noted that even the I-129 petitions indicating full-time employment indicated the same wages as those petitions for part-time employment. Counsel concluded by stating that even if the petitioner erroneously indicated on the ETA 750 that the

beneficiary's employment from 1997 to the present was full-time, this one item should not constitute a material fact resulting in the denial of an otherwise approvable petition.

Counsel also submitted an affidavit from the beneficiary dated March 27, 2008. In this document, the beneficiary stated that with the exception of the earliest H-1B petition and the most recent H-1B extension petition filed for him, the H-1B petitions indicated that he would be employed on a part-time basis. The beneficiary indicated that the compensation he received from the petitioner as reported on his tax returns from 2002 to the present reflect the fact that he had been employed on a part-time basis, that he continued to work in Brazil on behalf of the petitioner's Brazilian affiliate, that he worked in Brazil for all of 2003, and that he continued to be employed in Brazil for intermittent periods from 2002 to the present. The beneficiary also stated that the reference on the ETA 750 documentation to his being employed for 40 hours a week from 1997 to the filing date of the labor application was due to a clerical error and should have been corrected to indicate part-time employment.

Based on the evidence submitted to the record, the petitioner, with the exception of the initial H-1B petition and the most current H-1B petition, established that it filed H-1B petitions for the beneficiary for part-time work, ranging from 30 to 35 hours a week, at a salary level significantly lower than the stated prevailing wage in the instant petition. Thus, the AAO finds that the petitioner's previously filed H-1B petitions do not constitute evidence that the proffered position is not for a full-time position.

As previously stated, the petitioner did not establish its ability to pay the proffered wage as of the 2002 priority date and onward. For this reason, this petition may not be approved. 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.