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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

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date: DEC 07 2010

IN RE:

Petitioner:
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as a Other Worker pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
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 appeal will be dismissed.

The petitioner¹ is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook/kitchen helper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. 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 June 24, 2008 denial, the 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)(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(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 DOL. 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ In response to the director's request for evidence (RFE), counsel states that the petitioner in the instant case is [REDACTED] doing business under the trade name of [REDACTED]

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on June 5, 1991 and in response to the director's RFE, the petitioner claimed that there were over 400 employees on the payroll of all the establishments using the [REDACTED] trade name. On appeal, counsel states that the establishments operating under the trade name of [REDACTED] currently employ more than 500 workers. The Form ETA 750 was accepted on August 25, 2003. The proffered wage as stated on the Form ETA 750 is \$6.55 per hour which equates to \$13,624 per year based on a 40-hour week.³

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, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Further, the job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10).

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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I290B, 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).

³ The director expressed concern that changes were made to the proffered wage without proof that the DOL approved the changes. On appeal, the AAO sent an RFE to the petitioner requesting proof that the DOL approved the wage. In response to the AAO's RFE, the petitioner submitted evidence indicating that the labor certification application was initially submitted to the DOL with the proffered wage of \$6.55 per hour and that no changes were made to the proffered wage. The petitioner initially submitted the Form ETA 750 on behalf of a different beneficiary, [REDACTED] under ETA Case Number [REDACTED]. On request of the petitioner, the DOL subsequently accepted the beneficiary of the instant petition as a substitution for the first-named beneficiary prior to the approval of the labor certification application Form ETA 750, under the same ETA Case Number [REDACTED]. The proffered wage of the initially submitted Form ETA 750 was \$6.55 per hour. The AAO accepts the evidence that no changes were made to the proffered wage.

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 beneficiary claimed on Form ETA 750, item 15, to be unemployed and a housewife from October 2001 to the date that she signed the labor certification application, June 22, 2007. The petitioner has not presented any evidence of the beneficiary's employment or evidence of any wages paid. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the August 25, 2003 priority date and onwards.

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 return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 813, 881 (E.D. Mich. 2010). 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 USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, *supra* (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 11, 2008 with the receipt by the director of the petitioner's response to the director's RFE. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. In the director's RFE, the director requested the petitioner to submit the petitioning entity's IRS tax identification number federal income tax returns or audited financial statements from 2003 to present, and a list of all petitions filed by the petitioner in 2007.

In response, counsel submitted copies of Form W-2 summary reports (2005-2007), Forms 1096, Forms 1099-MISC and IRS Forms 941 filed by information on the trade mark business and liquor licenses issued to under the trade name a letter from the secretary of a copy of Employer's Quarterly Federal Tax Return for 2007, and Employer's Quarterly Payroll Reports for the years 2005 through 2007. Counsel stated that the petition was mistakenly filed under the employer identification number (EIN) which belongs to With the appeal, counsel submitted the complete tax returns of the listing an EIN of The AAO accepts that the petitioner's EIN number was mistakenly entered on the Form I-140 as initially submitted.

The letter from the Secretary of the dated March 3, 2008 explains that is a business name used by nine entities. Although the entities are predominately owned by the same individuals, they were created as separate legal entities.

On appeal, counsel states that the petitioner in the instant case is doing business under the trade name of The petitioner provided Forms 1120S, U.S. Income Tax Returns for an S Corporation for the years 2003 through 2007 that show the employer's identification number (EIN) as The payroll reports and records all indicate that located at has the EIN number The business license of indicates that the trade name is While the record is unclear as to whether the petitioner operates under the trade name of or the evidence establishes that the petitioner is with the EIN number of

The petitioner provided with the appeal, the complete tax returns for [REDACTED] from 2003 through 2007, with the EIN number of [REDACTED]. On appeal, the petitioner argues that because of the closeness of the corporations doing business under the [REDACTED] trade name, USCIS should consider the size and employee volume of all of the sister corporations. The record does not contain any evidence showing that the petitioning entity and the other corporations operating under the trade name of [REDACTED] are classified as members of a controlled group.⁵ Thus, the AAO will consider only the tax returns of [REDACTED] when determining whether the petitioner has the 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 petitioner's tax returns demonstrate its net income for 2003 through 2007, as shown in the table below.

- In 2003, the Form 1120S stated net income⁶ of \$121,282.

⁴ [REDACTED] is one of the independent entities operating under the trademarked name and 80% owned by the same officers.

⁵ Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120).

⁶ Where 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) line 18* (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed as of November 30, 2010) (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, credits, deductions, or other adjustments shown on its Schedule K for the years 2003, 2005, 2006,

- In 2004, the Form 1120S stated net income of \$159,537.
- In 2005, the Form 1120S stated net income of \$20,823.
- In 2006, the Form 1120S stated net income of \$52,543.
- In 2007, the Form 1120S stated net income of \$49,629.

Therefore, for the years 2003 through 2007, the petitioner had sufficient net income to pay the beneficiary the proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner has produced evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed Immigrant Petitions for Alien Worker (Form I-140) for 15 workers in addition to the petition for the beneficiary. The petitioner is obligated to demonstrate its ability to pay each of them the proffered wage during a part or the whole period for years 2003 through 2007.⁷

and 2007, the petitioner's net income is found on Schedule K of its tax return. For 2004, the net income is taken from line 21 of page one of the Form 1120S.

⁷ USCIS records show that there are 118 Form I-140 immigrant petitions filed under the trade name of [REDACTED], however, only 15 of them were filed and approved using the Federal Employer Identification Number: [REDACTED] specifically assigned to the instant petitioning entity, [REDACTED].

The detailed information about these approved immigrant petitions is as follows:

- [REDACTED] filed on September 24, 2001 with the priority date of March 12, 2001, and approved on April 9, 2002. The beneficiary was adjusted to lawful permanent resident status on April 2, 2004.

- [REDACTED] filed February 6, 2003 with the priority date of March 19, 2001, and approved on April 6, 2004. The beneficiary was adjusted to lawful permanent resident status on September 6, 2004.

- [REDACTED] filed on January 16, 2007 with the priority date of February 3, 2004, and approved on August 23, 2007.

- [REDACTED] filed on June 13, 2007 with the priority date of December 29, 2003, and approved on November 4, 2008.

- [REDACTED] filed on June 15, 2007 with the priority date of October 19, 2005, and approved on October 24, 2007.

- [REDACTED] filed on July 12, 2007 with the priority date of April 5, 2004, and approved on

On appeal counsel asserts that the beneficiaries of other pending petitions have received remuneration for their services. Counsel submits copies of the petitioner's IRS Forms 941 and Forms W-2 to support this assertion. If the petitioner establishes by documentary evidence that it employed all beneficiaries 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. However, without evidence of the social security numbers of the paid beneficiaries and the proffered wage stated in each of the petitions, the AAO is unable to determine whether such wages were paid. Evidence submitted by previous counsel on appeal shows that the petitioner employed and paid one of the beneficiaries of the approved petitions, [REDACTED] \$8,658.86 in 2003, \$30,144.91 in 2004, \$33,500 in 2005, and \$38,600 in 2006. The record does not contain such evidence showing that the petitioner employed and paid the proffered wages to the other 14 beneficiaries of the approved petitions, nor does the record contain evidence that the petitioner employed and paid the beneficiary the proffered wage. The petitioner has established that it paid [REDACTED] partial wages in 2003 and the full proffered wage in 2004 through 2006. The petitioner is still obligated to demonstrate that it had sufficient net income or net assets to pay the difference of \$12,945⁸ between wages actually paid to [REDACTED] in 2003 and the proffered wages of the instant beneficiary and the beneficiaries of the 14 other petitions.

In his brief, counsel states that with respect to additionally filed immigrant petitions, USCIS should have provided specific information in an RFE so that the petitioner could respond with information pertaining to any other beneficiaries. The director's RFE requested that the petitioner provide a list of all petitions filed by the petitioner in 2007, including names of beneficiaries, classification requested, priority date and receipt numbers, the proffered wage of each beneficiary and evidence of

March 12, 2008.

[REDACTED] filed on October 18, 2007 with the priority date of April 2, 2004, and approved on July 9, 2008.

- [REDACTED] filed on December 13, 2007 with the priority date of August 25, 2003, and approved on July 28, 2008.

- [REDACTED] filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.

[REDACTED] filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.

- [REDACTED] filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.

- [REDACTED] filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.

[REDACTED] filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.

[REDACTED] filed on December 13, 2007 with the priority date of October 17, 2003, and approved on July 28, 2008.

- [REDACTED] filed on December 14, 2007 with the priority date of October 17, 2003, and approved on July 30, 2008.

⁸ Counsel states in his brief that the proffered wage in [REDACTED] case is \$21,603.

any wages paid to those beneficiaries as of the priority date to present.⁹ The petitioner's response did not include the requested information. Instead, counsel provided copies of 2004 through 2006 W-2 forms of [REDACTED] as proof of his employment and its ability to pay [REDACTED] the proffered wage of \$21,603. This evidence does not establish the petitioner's ability to pay all of its sponsored workers from each respective priority date until each beneficiary obtains permanent residence.

Counsel states, as evidenced by Forms 1099 for 2004 through 2007, that the petitioner employed a number of individuals on a temporary basis and disbursed a significant amount of money, \$49,191, \$75,683, \$51,385, and \$64,168, respectively, paying their wages. Counsel states that these amounts should be calculated as available assets, because it was spent for temporary services which would have been provided by the beneficiaries of immigrant petitions who the petitioner seeks to employ permanently. However, the record does not verify the full-time employment, or provide evidence that the petitioner will replace such workers with the beneficiary and its other sponsored workers. In general, wages paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position(s) held by these temporary workers involve the same duties as those set forth in the ETA Forms 750 filed by the petitioner for all of its sponsored workers.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the record of proceeding.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the 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 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

⁹ The director's decision states that USCIS records show that the petitioner filed 24 petitions in 2007. The director's decision does not indicate which of the 24 petitions filed in 2007 belong to the petitioner, [REDACTED], with EIN [REDACTED].

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 relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the annual wages paid by the petitioner range from \$490,019 in 2003 to \$606,382 in 2007. While the petitioner has shown steady growth in wages paid and gross revenue, the petitioner has not provided evidence of its historical growth, its reputation within the industry, a prospectus of its future business ventures, or any evidence indicating why the years 2003-2007 were out of the ordinary or that the petitioner experienced unusual occurrences affecting its ability to pay all of its sponsored workers in those years. The evidence fails to document the petitioner's ability to meet its total wage obligation.

The AAO notes that if each of the 15 additional beneficiaries were paid between \$13,624 (the beneficiary's annual wage) and \$21,603 (the proffered wage), the petitioner would need to show its ability to pay an additional \$204,360 to \$324,045 annually. Given the record as a whole, the petitioner's history of filing petitions and the fact that the number of immigrant petitions reflects an estimated increase of 30% - 50% of the petitioner's current payroll, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

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 not been met.

ORDER: The appeal is dismissed.