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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:



Office: TEXAS SERVICE CENTER

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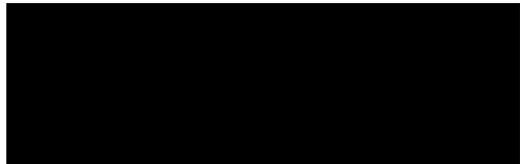
Petitioner:

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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: A Form I-140, Immigrant Petition for Alien Worker, filed for the beneficiary and accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL) was denied by the Director, Texas Service Center (TSC) on August 3, 2006. That petition was filed under the corporation's "trading as" name of [REDACTED]. An appeal to the Administrative Appeals Office (AAO) was dismissed on August 1, 2007. The petitioner submitted a new Form I-140 under its corporate name on August 29, 2007 for the same beneficiary accompanied by the same Form ETA 750. This preference visa petition was denied by the TSC director and is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station which seeks to employ the beneficiary permanently in the United States as a [REDACTED]. As required by statute, a Form ETA 750 accompanied the petition. The director determined that the petitioner had not established that the beneficiary possessed the experience requirements of the labor certification. 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.

Section 203(b)(3)(A)(i) of 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(l)(3) states, in pertinent part:

(ii) *Other documentation – (A) General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the USDOL's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 16, 2001.

United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires the beneficiary to possess two years experience in the job offered or two years experience in the related occupation of retail management. Block 15 states additional requirements as being Wed. – Sun. 4 p.m. – 12 midnight.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of retail sales manager must have two years of experience in the job offered or two years experience in the related occupation of retail management with the hours of employment being Wednesday through Sunday at 4 p.m. to 12 a.m.

In this case, previous counsel initially failed to submit any evidence of the beneficiary's experience. On June 23, 2006, the director issued a Notice of Intent to Deny requesting that the petitioner submit the original Form ETA-750 or Form ETA-9089 labor certification and to provide persuasive documentary evidence of the beneficiary's experience in the job being offered. Previous counsel was informed that:

evidence of this experience should be in the form of letters from current or former employers listing the beneficiary's exact dates of employment and a detailed description of the duties performed in that position. If the letter of experience is to come from the current employer, please provide a copy of the beneficiary's Form I-9 (Sections 1, 2, and 3) or most current Form W-2 with the letter of experience.

On July 24, 2006, previous counsel submitted the original labor certification (ETA-750), approved by the USDOL on June 29, 2005, with a letter of experience from [REDACTED], dated July 10, 2006. The letter of experience states:

¹ It is noted that the ETA-750B, Part 15, Work Experience, requires the beneficiary to "list all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9," the beneficiary listed under penalty of perjury as having been employed by the [REDACTED] as a manager from June 2001 through the present (i.e. October 24, 2002), as having been unemployed from April 2001 through May 2001, and as having been employed by [REDACTED] as a manager from February 1996 through March 2001. However, the record contains a Form I-213, Record of Deportable/Inadmissible Alien, dated April 1, 2003, indicating that that an officer of the USCIS apprehended the beneficiary in [REDACTED] At his interview with the USCIS officer, the

This is to certify that [the beneficiary] was employed by our company as a manager from March 1994 to August 1996, and he worked 40 hours per week.

He was responsible to supervise and coordinate activities of our convenience store and gas station. He determined sequence of work to be scheduled to provide quick and efficient service to customers and to regulate workload. He reconciled daily cash with sales receipts and made daily bank deposits. He ordered and maintained inventory. He maintained records of underground petroleum storage tanks in accordance with state and federal environment laws. He was responsible for bank deposits.

He is a very diligent, hardworking employee. I highly recommend him for employment anywhere.

The director denied the visa petition on August 3, 2006 stating that "the experience in this proceeding was not disclosed to USDOL during the labor certification, and the labor certification was not predicated on such experience."

On appeal, previous counsel submitted another Part 15 for the ETA-750, dated September 26, 2006, listing [redacted] and stated that the beneficiary was employed by [redacted] March 1994 to August 1996. Previous counsel also submits an experience letter, dated August 7, 2006, from [redacted], that stated that it employed the beneficiary as a manager from February 1996 through March 2001. Previous counsel stated:

In the instant case the alien qualifies in two respects (a) He has worked for at least 2 years in the job offered and (b) He has also worked in a retail management position as a manager for at least 2 years as well.

The petitioner attached the alien's work experience in the job offered – namely [redacted] as proof of the alien's work experience. This in itself should be sufficient to qualify the alien as having the requisite experience and therefore enough to approve the application.

The petitioner is also supplementing the record by (i) attaching a second letter from the retail management experience which is the second way in which the alien qualifies for this position as well. Moreover should there be further need, the Petitioner has also attached a supplement to ETA 750B listing the experience at the [redacted] as well.

beneficiary stated that he worked at the [redacted] from 2000 until April 1, 2003 as a clerk. Additionally, [redacted] was not listed on the original Form ETA-750.

Previous counsel was correct in part. The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² Therefore, the AAO considered the letter provided on the first appeal from [REDACTED] (It is noted that on this appeal, counsel argues that the [REDACTED] letter shows the beneficiary has the experience required by the Form ETA 750 to qualify for the job.) However, the AAO would not consider the supplemental Form ETA-750B as it was not provided to USDOL before the labor certification was approved by USDOL. It was determined that absent persuasive supporting evidence, the letter from [REDACTED] did not support the petitioner's burden of proving the beneficiary's qualifications. The labor certification required information including jobs related to the proffered position. If the beneficiary's alleged experience at [REDACTED] was relevant to qualifying him for the proffered position, such representation should have been made on the labor certification. Omitting experience that forms the primary basis for alleging qualification appears disingenuous especially to claim it after USDOL's certification. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

In addition, while it appears that the petitioner has established that the beneficiary met the experience requirements of the labor certification with the letter from [REDACTED] (employment from February 1996 through March 2001 or five years and one month), AAO found that there was an inconsistency in the record that would need to be addressed before adjudication of the visa petition can be completed. The inconsistency consists of the overlapping of employment. On the amended ETA-750B, the beneficiary claims to have been employed by [REDACTED] from March 1994 through August 1996, and, on the original ETA-750B, he claims to have been employed by [REDACTED] from February 1996 through 2001. Both ETA-750Bs state that the beneficiary was employed for 40 hours per week. Therefore, from February 1996 through August 1996, the beneficiary would have worked 80 hour weeks, 40 hours in [REDACTED] and 40 hours in [REDACTED]. While this is certainly not impossible, the AAO is not convinced that the beneficiary could sustain such time demanding employment for a full six months. It would mean that the beneficiary worked 16-hour days with a 37.5 mile commute between each business.³ Counsel did not address this inconsistency on appeal. Clarification of this double employment with appropriate evidence would be needed to continue adjudication of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 It is noted that verifiable evidence such as Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, was not provided for either [REDACTED] that corroborates the beneficiary's 80-hour work weeks. 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)).

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Finally, it has not been established that the beneficiary's claimed employment with [REDACTED] constitutes experience in the alternate occupation of "retail management." The record does not establish that this is a retail business.

Accordingly, for these reasons, the record is not persuasive in establishing that the beneficiary meets the experience requirements of the labor certification.

In the decision dated August 1, 2007, the AAO determined that another issue that must be determined was whether the petitioner had established its continuing ability to pay the proffered wage from the priority date of March 16, 2001. This issue will also be considered in this appeal, beyond the decision of the director.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. See 8 CFR § 204.5(d). The priority date in the instant petition is March 16, 2001. The proffered wage as stated on the Form ETA 750 is \$2,950 per month or \$35,400 annually.

Relevant evidence submitted as proof of the petitioner's ability to pay the proffered wage of \$35,400 includes a copy of a 2001 Form 1120, U.S. Corporation Income Tax Return, for [REDACTED] Corporation, copies of the petitioner's 2002 through 2007 Forms 1120, a copy of a [REDACTED] Tax

Information Report, and copies of the petitioner's through unaudited financial statements.⁴

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 Sonegawa*, 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 October 24, 2002, the beneficiary does not claim the petitioner as a present or former employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary to establish that the petitioner employed the beneficiary in any of the pertinent years (2001 to the present). Therefore, the petitioner has not established that it employed the petitioner in 2001 through 2007.

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*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (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*

⁴ Reliance on unaudited financial records was misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the unaudited financial statements will not be considered when determining the petitioner's ability to pay the proffered wage of \$35,400.

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*, *supra*, at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120. As a threshold issue, the 2001 Form 1120 tax return for [REDACTED] is irrelevant in this proceeding. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the 2001 tax returns for [REDACTED]

Corporation will not be considered when determining the petitioner's continuing ability to pay the proffered wage of \$35,400 from the priority date of March 16, 2001. In view of the above, the petitioner's net income for years 2002 to 2007 was as follows:

| <u>Year</u> | <u>Net Income</u> |
|-------------|-------------------|
| 2002 | -\$3,308 |
| 2003 | \$3,029 |
| 2004 | \$6,932 |
| 2005 | \$4,747 |
| 2006 | -\$9,639 |
| 2007 | \$0 |

Therefore, the petitioner has not established its ability to pay the proffered wage through its net income in 2001 to 2007.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS 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, 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2002 through 2007 were as follows:

| <u>Year</u> | <u>Net Current Assets</u> |
|-------------|---------------------------|
| 2002 | \$37,692 |

⁵ According 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.

| | |
|------|----------|
| 2003 | \$45,721 |
| 2004 | \$46,943 |
| 2005 | \$52,400 |
| 2006 | \$42,049 |
| 2007 | \$41,163 |

The petitioner could have paid the proffered wage of \$35,400 in 2002 through 2007 from its net current assets. However, the petitioner has not established its ability to pay the proffered wage of \$35,400 in 2001 as USCIS will not accept the tax returns of another corporation as evidence of the petitioner's ability to pay. Again, see *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980) and *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

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, supra*. 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 [REDACTED] 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 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 this case, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or net current assets during the requisite period beginning in 2001. Additionally, the corporation has not established its historical growth, the occurrence of any uncharacteristic business expenditures or losses, its reputation within the industry or whether the beneficiary is replacing a former employee or an outsourced service. 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 wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.