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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

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[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **OCT 22 2010**

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:

[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.

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a subsequent motion to reopen. The director granted the motion and reaffirmed his decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a cook. 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 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 8, 2009 denial, 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 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).

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.¹

The record indicates the petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in December, 1999³ and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

The Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the application is \$10.00 per hour which equates to \$20,800 per year based on a 40-hour week. The application states that the position requires two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April [REDACTED] the beneficiary claimed to have worked for [REDACTED] from June 1997 to January 2000. The Form G-325A, Biographic Information, submitted by the beneficiary in support of his Form I-485 Application to Adjust Status to Permanent Resident, shows the beneficiary was employed by the [REDACTED] as a cook from June 1997 to January 2000 and by [REDACTED] as a cook from January 2000 to June 12, 2007, which is the date the Form G-325A was signed by the beneficiary.

¹ 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).

² A limited liability company is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

³ The petitioner's tax returns indicate that it was established on January 1, 2000. According to the California Secretary of State's website, the petitioner was established on November 19, 1999. *See* [http://\[REDACTED\]](http://[REDACTED])

⁴ The petitioner does not explain the relationship between [REDACTED] however, they have the same address and EIN number. The beneficiary's 2005 through 2008 Form W-2s list both names, [REDACTED] located at [REDACTED] and EIN number [REDACTED]. The petitioner's website indicates that [REDACTED] is in the space of the former [REDACTED]. As the EIN reporting information is the same under both names, the AAO accepts the beneficiary's 2005-2008 Forms W-2 as evidence of the petitioner's payment of wages to the beneficiary for those years.

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).

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. In the instant case, the petitioner provided the beneficiary's Forms W-2 for the years 2003 through 2008 which reflect the following payments to the beneficiary from the petitioner:⁵

- 2003 \$7,710
- 2004 \$7,650
- 2005 \$7,740
- 2006 \$8,710
- 2007 \$20,720
- 2008 \$20,240

The petitioner's letter dated April 5, 2009, states that the W-2s for 2003 through 2006 were for wages paid at the hourly proffered wage of \$10.00 for part-time work. Remuneration for part-time employment is not sufficient to establish the petitioner's ability to pay the full proffered wage.⁶ Accordingly, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date, April 30, 2001 through 2006. Similarly, although the petitioner paid the beneficiary almost the full wage for 2007 and 2008, the wages paid in those years

⁵ The petitioner did not provide Forms W-2 for 2001 and 2002.

⁶ The petitioner states that its business could only support the part-time employment of the beneficiary from 2003-2006, indicating that it did not have the ability to pay the proffered wage for those years. The labor certification job offer must be for full-time employment. 20 C.F.R. § 656.3. The job offer must be realistic from the time of the priority date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm.1971).

were less than the full proffered wage. The petitioner must establish that it can pay the difference between the wages paid and the proffered wage, which is as follows:

- 2003 \$13,090
- 2004 \$13,150
- 2005 \$13,060
- 2006 \$12,090
- 2007 \$80.00
- 2008 \$560.00

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage since the filing date of the labor certification application, 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 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*, --- F. Supp. 2d. at *6 (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 March 19, 2009, with the receipt by the director of the petitioner’s submission in response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2008 tax return was not yet due; therefore, the petitioner’s 2007 federal income tax return is the most recent return available. The petitioner’s tax returns demonstrate its net income as detailed in the table below.

- In 2001, the petitioner’s Form 1065 stated net income of -\$19,437.⁷
- In 2002, the petitioner’s Form 1065 stated net income of -\$18,102.
- In 2003, the petitioner’s Form 1065 stated net income of -\$15,316.
- In 2004, the petitioner’s Form 1065 stated net income of -\$8,441.
- In 2005, the petitioner’s Form 1065 stated net income of -\$12,612.
- In 2006, the petitioner’s Form 1065 stated net income of \$5,500.
- In 2007, the petitioner’s Form 1065 stated net income of -\$1,511.

Therefore, for the years 2001 through 2007, the petitioner did not establish that it had sufficient net income to pay the difference between the amounts paid to the beneficiary in each year and the 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

⁷ For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Return of Partnership Income. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s Schedules K have relevant entries in 2002, 2003, 2004, 2005, 2006 and 2007; therefore, its net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) for those years.

wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15 through 17. If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets, as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net current assets of \$5,182.
- In 2002, the petitioner's Form 1065 stated net current assets of \$2,855.
- In 2003, the petitioner's Form 1065 stated net current assets of \$5,735.
- In 2004, the petitioner's Form 1065 stated net current assets of \$0.
- In 2005, the petitioner's Form 1065 stated net current assets of \$0.
- In 2006, the petitioner's Form 1065 stated net current assets of \$0.
- In 2007, the petitioner's Form 1065 stated net current assets of \$1,025.

Therefore, for the year 2001 through 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. In 2007, the petitioner's current net assets combined with the monies paid the beneficiary establish the petitioner's ability to pay the beneficiary's proffered wage for that year.

On appeal, counsel states that the owners' assets⁹ should be included in the calculation of the petitioning LLC's ability to pay the proffered wages as they are one and the same. Counsel states that under *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), not all corporations are considered to be legally distinct from their shareholders. Counsel states that California law specifically renders any separateness between owner and entity invalid under the alter ego doctrine, which deems the entity and owner to be one and the same. In the instant case, counsel asserts that USCIS must analyze the petitioner's relationship to its owners before concluding that the

⁸ 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.

⁹ The petitioner submitted a computer print-out dated July 29, 2009 in the name of the petitioner's 50 percent shareholder, who owns the petitioning entity with his wife: Personal Accounts, showing two separate checking accounts, with balances of \$111,755 and \$1,954; his Visa balance of \$6,367; his home equity line balance of \$105,402; and a mortgage balance of \$192,799. The petitioner also submitted a copy of a statement dated June 30, 2009 in a corporate name valued at \$240,199. The shareholder stated in a letter that the named corporation is his family business, that he serves as the business' president, and that the business has an average annual net income for the past 20 years of \$250,000.

owners' personal assets cannot be used to show the ability to pay the proffered wage. Counsel states that the petitioner is classified as an LLC solely for tax reasons, and is not legally distinct from its owners; thus, USCIS should consider the assets of the shareholders.

A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has one owner, it will automatically be treated as a sole proprietorship by the IRS unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner's tax returns reflect on Schedule B that the petitioning entity is a domestic limited liability company for federal tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The assets of its owners cannot be considered in determining the petitioning entity's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.¹⁰ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to their initial investment, the total income and assets of the owners and others, and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. Nothing here shows that the owners are responsible personally for the corporate debt despite counsel's claim of the "alter ego doctrine."

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."¹¹

¹⁰ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

¹¹ Counsel asserts that *Sitar* does not address the issue that not all corporations are the same and not all owners have the same obligation. Counsel's general statement is true. However, as the petitioner is structured as a limited liability company, personal assets would not be considered. This is in contrast to a sole proprietor. 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 would be considered as part of a sole proprietor'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 (7th Cir. 1983). A sole

Given that the petitioner and its owners are distinct legal entities, the AAO will not consider the personal assets of the shareholders in determining whether the petitioner has the ability to pay.

On appeal, counsel submits a copy of an unpublished decision from the AAO. This unpublished decision is not binding in this proceeding. 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).

Counsel's assertions on appeal do not outweigh the evidence presented in the petitioner's tax returns, which demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL through 2006.

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 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 co-owner of the petitioner states that he and his wife purchased the petitioning entity in December, 1999 and commenced operating the restaurant in February, 2000. The petitioner states that the business was negatively impacted following the September 11, 2001 terrorist attacks in New York and Washington, DC. The AAO notes that the petitioner's business is located in [REDACTED] and that the petitioner has not provided any evidence linking the general effects of the 9/11 attack on the United States with its negative net income from 2001 through 2005. Simply going

proprietor is liable for the debts of his/her business. Here, as the LLC limits personal liability, personal assets of the shareholders are not considered.

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)). The petitioner also states that for two and one-half years there was a road construction project in front of the restaurant but does not provide evidence of how this project impacted his business financially. The petitioner's total gross receipts for 2001 were \$42,092; 2002: \$56,576; 2003: \$65,013; Total salaries paid for these years were 2001: \$7,350; 2002: \$13,338; 2003: \$16,903. In the first three years following the priority date, the beneficiary's wage alone exceeded all wages paid and would account for one-half or a third of the petitioner's gross receipts in these years. The petitioner must establish that the job offer is realistic from the time of the priority date. The petitioner's tax returns do not reflect that full-time employment was realistic for the entire time period from 2001 onward. The petitioner has not established the historical growth of its business since its claimed establishment in 1999, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within the industry. It has not provided or a prospectus of its future business ventures, or any other evidence to demonstrate its ability to pay the proffered wage.

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 from the priority date, April 30, 2001 through 2006.

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.