

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

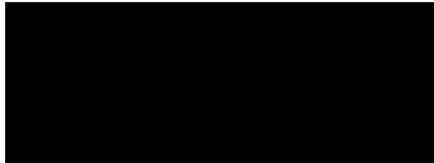
PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6

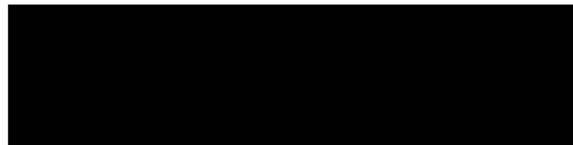


FILE:  Office: TEXAS SERVICE CENTER Date: FEB 09 2011

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, 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,


Perry Rhew
Chief, Administrative

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 petitioner is an auto repair business. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's 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)(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 unavailable.

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 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 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).

Here, the Form ETA 750 was accepted on September 17, 2004. The proffered wage as stated on the Form ETA 750 is \$21.23 per hour (\$44,158.40 per year). The Form ETA 750 states that the position requires one and one-half years of experience in the job offered.

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

Accompanying the petition and labor certification, counsel submitted the petitioner's federal income tax (Form 1065) return for 2006 and the petitioner's bank checking statements for the period August 31, 2007, to September 28, 2007.

The director issued a request for evidence (RFE) dated September 20, 2008. The director requested, *inter alia*, the petitioner's federal income tax returns (Forms 1065) with all supplementary schedules for 2004, 2005, and 2007, and any audited financial statements "the partnership may have obtained for the referenced years." Counsel submitted the petitioner's federal income tax (Forms 1065) returns for 2004, 2005 and 2007.

The director stated evidence may include the general partners' individual incomes and assets and summaries of living expenses "during the relevant years," and if general partners' individual resources are to be considered, "submit clear documentary evidence identifying the general partners including a copy of any written partnership agreement." Counsel submitted a "Certificate of Formation" of the petitioner filed with the State Treasurer of the State of New Jersey on October 23, 2003; the general partners' (who are husband and wife) joint personal federal income (Forms 1040) tax returns for 2004 through 2007; a hand written statement by the president of the petitioner dated October 13, 2008 along with the spouses'² mortgage loan account statement dated June 11, 2008; and a realty property tax assessment notice. No summaries of living expenses "during the relevant years" were submitted.

Regarding the beneficiary, the director requested proof of any wage or salary (i.e. W-2 Statement) paid to the beneficiary by the partnership "during the relevant years." No W-2 Statements were submitted.

On appeal, counsel submitted a legal brief dated February 5, 2009; a statement dated February 4, 2009, from the petitioner's accountant; and a statement from the president of the petitioner dated February 3, 2009, as well as documents already submitted and mentioned above.

The record indicates the petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065.³ On the petition, the petitioner claimed to have been established in 2003

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 Thomas and Denice Lynch.

³ An 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 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

and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on September 1, 2004, the beneficiary did not claim to have worked for the petitioner, but the president of the petitioner by his statement dated October 9, 2008, stated that the beneficiary had been employed as a mechanic since January 2004. There is no explanation in the record for this inconsistency. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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, 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, although a USCIS officer requested all Wage and Tax (W-2) Statements issued to the beneficiary since September 2004, counsel responded on October 28, 2008, that the petitioner has not issued any W-2 Statements to the beneficiary. The petitioner has not submitted any wage/salary/compensation evidence other than an unsubstantiated letter dated October 9, 2008, claiming the beneficiary was paid \$550.00 per week in 2004, \$700.00 per week in 2005 and 2006, and \$800.00 per week in 2007. However, in that documentary evidence verifying this claim, the uncorroborated claim by the petitioner is not persuasive. 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)).

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.

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 873 (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*, 696 F. Supp. 2d at 881 (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 118. "[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 October 17, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return is the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2004, the petitioner's Form 1065 stated net income of <\$19,486.00>.⁴
- In 2005, the petitioner's Form 1065 stated net income of <\$28,948.00>.
- In 2006, the petitioner's Form 1065 stated net income of \$38,213.00.
- In 2007, the petitioner's Form 1065 stated net income of \$43,282.00.

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not establish that it had sufficient net income to pay 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 wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ The year-end current assets of the LLC filing taxes as a partnership are shown on Schedule L, lines 1(d) through 6(d) 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(d) through 17(d). If the total of a LLC'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 2004, the petitioner's Form 1065 stated net current assets of <\$27,485.00>.
- In 2005, the petitioner's Form 1065 stated net current assets of <\$20,615.00>.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. For an LLC filing taxes as a partnership, where an LLC'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. Partnership Income Tax Return. However, where an LLC's 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 four 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 for additional adjustments and other information so its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

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.

- In 2006, the petitioner's Form 1065 stated net current assets of <\$40,535.00>.
- In 2007, the petitioner's Form 1065 stated net current assets of <\$32,821.00>.

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets.

On appeal, counsel asserts the director should have considered a member's individual income as reflected in the individual tax returns for years 2004 through 2007, and the member's individually held assets, (i.e. equity in the [REDACTED] residence located at [REDACTED] and the "value" of the partners' business property).

At the onset, it must be noted that the petitioner is an LLC, not a partnership, even though the petitioner uses a partnership's return to file its taxes. Like a corporation, an LLC is a separable and distinct entity from its members. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its members cannot be considered in determining the LLC's ability to pay the proffered wage. Therefore, counsel's contention is misplaced.

Counsel states that a DOL Board of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that although the petitioner in that case was a corporate employer, this case stands for the proposition that "it was proper to consider the personal assets of the funding source when determining the petitioner's ability to pay the proffered wage." In *Ohsawa America*, the Board determined that the \$4 million personal assets of the corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. In this case, counsel desires to utilize the partners' personal income, residence and/or business premises to pay the proffered wage, when neither asset has been so utilized. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel does not state how the DOL precedent is binding in these proceedings. 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, BALCA 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 further contends that the average balances "reflected in the petitioner's submitted commercial bank account statements" are proof of the petitioner's ability to pay the proffered wage. Counsel's reliance on the monthly closing balances in the petitioner's bank account 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 returns.

Additionally counsel states that that the Schedule L asset and liability values stated on the Schedules L of the partnership tax returns (Forms 1065) submitted "in no way correspond" to the net current assets values stated in the director's decision. The net current assets stated for 2004 through 2007 in this discussion and those in the director's decision are the same and they are all negative. Negative net current assets can not be sufficient evidence of the petitioner's ability to pay the proffered wage. Counsel states that a limited liability company is not a corporation and by implication computes its net current assets differently but offers no explanation how this computation would occur or how it would improve the petitioner's ability to pay the proffered wage.

Counsel contends that [REDACTED] individual income" should have been considered since the members of the LLC can legally guarantee an obligation of the LLC. The regulation at 20 C.F.R. § 656.20(c)(3) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner if the wage is paid on a weekly, bi-weekly, or monthly basis, therefore guarantees of cash commission/bonuses "or other incentives" are within the purview of regulation. However, it is not clear that the *proffered wage* may be the subject of a guaranty according to regulation.

No information was provided such as W-2 or 1099-MISC statements or pay statements by the petitioner to determine how the beneficiary was paid although that evidence was requested by the director in his RFE. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Counsel has not supported by any evidence that wage/compensation payments were made by the petitioner to the beneficiary.

The "guarantee" referenced by counsel, is referenced in letter dated February 3, 2009, was made approximately eight years after the priority date. In the letter, a member of the petitioner purports to guarantee payment of the proffered wage by making a unilateral statement, which on its face is not binding or legally enforceable by either the petitioner or the beneficiary. It is not clear that what counsel asserts is a continuing personal commitment to pay the proffered wage is enforceable, as no guaranty agreement was submitted between the petitioner (an LLC), an individual (i.e. [REDACTED]), and the beneficiary. *See also Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). These are all necessary parties to a guaranty instrument. Regardless, as noted above, an LLC is a separable and distinct entity from its members. The assets of the individual members may not be considered in evaluating the petitioner's ability to pay the proffered wage.

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. 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 petitioner claimed to have been established in 2003 and to currently employ two workers. The petitioner's gross receipts were substantial, 2004-\$1,696,780.00, and in 2007-\$499,923.00, but they indicate a decline in business. Based upon the partnership tax returns (Forms 1065) submitted for 2004 through 2007, the petitioner was unable to pay the proffered wage through either evidence of its net income or net current assets. Although requested by the director, the petitioner failed to submit W-2 Statements or any evidence of wages/salary/compensation paid to the beneficiary although the president of the petitioner by his statement dated October 9, 2008, stated that the beneficiary had been employed as a mechanic since January 2004. Without documentary evidence to support the claim, the assertions of counsel (or in this case the petitioner) will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, based upon what is known, the petitioner has employed the beneficiary, but contrary to the director's RFE, the petitioner has not submitted evidence of wages paid to the beneficiary. Wage information can be utilized by USCIS to calculate the petitioner's ability to pay the proffered wage in conjunction with the petitioner's net income and net current assets.

Further, counsel has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. The petitioner has not provided evidence of a turn-around of the petitioner's business fortunes, or expectations of increased

profitability. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.