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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

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

FEB 17 2011

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

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:

[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. 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 Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate sales company. It seeks to employ the beneficiary permanently in the United States as a restoration/rehabilitation carpenter. 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 denial, the issue to be examined 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 other 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 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 December 17, 2004. The proffered wage as stated on the Form ETA 750 is \$24,088.00 per year. The position requires four years of high school education, no training, and one year of experience in the certified job or a year of experience in a related occupation.

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

On appeal, counsel asserts that the director failed to consider the totality of the circumstances to determine the petitioner's ability to pay the proffered wage. Counsel argues that the petitioner's total assets without depreciation, unappropriated retained earnings, bank accounts, and corporate history demonstrate that it has the continued ability to pay the beneficiary the proffered wage. Counsel submits copies of the first page of bank statements dated January 31, 2006, March 15, 2006, June 30, 2006, September 29, 2006, December 29, 2006, January 31, 2007, and April 30, 2007, in support of the appeal. Relevant evidence in the record also includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for 2004, 2005, 2006, and 2007, and copies of a "Federal Income Tax Summary" for both 2006 and 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on February 20, 2001, gross annual income of \$56,846.00, and to currently employ one worker. Although the Form 1120 tax returns in the record contain no information relating to the petitioner's fiscal year, it is assumed that the petitioner's fiscal year corresponds to the calendar year. The Form ETA 750B reflects that the beneficiary has not worked for the petitioner.

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).

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).

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 record contains no evidence demonstrating that the beneficiary has worked for the petitioner.

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 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 September 30, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The record contains the petitioner’s Form 1120 tax returns for 2004, 2005, 2006, and 2007. These tax returns demonstrate the following financial information concerning the petitioner’s ability to pay the beneficiary the proffered wage of \$24,088.00 per year from the priority date of December 17, 2004:

- In 2004, the Form 1120 stated a net income² of \$85,175.00.
- In 2005, the Form 1120 stated a net income of <\$12,385.00.>³
- In 2006, the Form 1120 stated a net income of \$14,583.00.
- In 2007, the Form 1120 stated net income of <\$14,883.00.>

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the years 2005, 2006, and 2007.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities. A corporation’s year-end current assets are shown on the Form 1120 tax return on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on the Form 1120 tax return on Schedule L, lines 16 through 18.⁴ If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage

² For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁴ 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.

using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005, 2006, and 2007 as shown in the table below.

- In 2005, Schedule L of the Form 1120 stated net current assets of \$106,666.00.
- In 2006, Schedule L of the Form 1120 was left blank.
- In 2007, Schedule L of the Form 1120 was left blank.

Consequently, the petitioner had sufficient net current assets to pay the proffered wage in 2005. Although the petitioner was not required to submit a completed Schedule L with the Form 1120 tax returns in 2006 and 2007⁵, the petitioner provides copies of a "Federal Income Tax Summary" for both 2006 and 2007 on appeal. The "Federal Income Tax Summary" for 2006 listed the petitioner's end of year assets as \$56,846.00 and end of year liabilities and equity as \$182,800.00, or <\$125,954.00> in net assets for 2006, and the "Federal Income Tax Summary" for 2007 listed the petitioner's end of year assets as \$54,812.00 and end of year liabilities and equity as \$153,376.00, or <\$98,564.00> in net assets for 2007. Consequently, the petitioner has failed to establish that it possessed sufficient net current assets to pay the beneficiary the proffered wage in 2006 and 2007. It is noted that the Federal Income Tax Summaries do not breakdown the assets and liabilities into current assets and liabilities. Nevertheless, as the petitioner has the burden of persuasion in these proceedings, the 2006 and 2007 Federal Income Tax Summaries do not establish that the petitioner had sufficient assets in those years to pay the beneficiary the proffered wage.

On appeal, counsel asserts that the "Federal Income Tax Summary" for 2006 reflected that the petitioner had \$182,800.00 in "unappropriated retained earnings" in 2006, and the "Federal Income Tax Summary" for 2007 showed that the petitioner had \$153,376.00 in "unappropriated retained earnings" in 2007. Counsel contends that these funds were available to pay the proffered wage to the beneficiary in these years. However, money used to pay expenses, assuming they were nondiscretionary and necessary to the business operations, cannot also be assets. Retained earnings are a company's accumulated earnings since its inception less dividends. *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings. Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. *Id.* Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. *Id.* at 27. The record does not demonstrate that the petitioner's retained earnings are truly unappropriated and are cash or current assets that would be available to pay the proffered wage.

⁵ See Instructions for Form 1120 at <http://www.irs.gov/pub/irs-pdf/i1120.pdf> (accessed on February 3, 2011) (indicating that a corporation with less than \$250,000.00 in total assets beginning in tax year 2006 is not required to submit a completed Schedule L with the Form 1120 tax return).

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111. Therefore, the AAO will not consider the petitioner's depreciation when evaluating its continuing ability to pay the proffered wage to the beneficiary.

On appeal, counsel states that the petitioner's tax planning strategy results in a net income figure that does not accurately reflect the petitioner's financial health. Counsel asserts that the director should consider the totality of the circumstances, including accounting practices⁶, when making determinations of the petitioner's ability to pay the proffered wage. It is noted that the instant case arose in the seventh circuit. The seventh circuit court of appeals recently issued a decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage.

The court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates

⁶ Counsel has not made any specific references or contentions concerning the petitioner's accounting practices.

the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *Id.* at 596. The court stated that if an employer has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure. *Id.* at 595.

Therefore, the AAO will require the petitioner to establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by approximately 1.4. The multiplier is based on data provided by the Bureau of Labor Statistics, which is available at <http://www.bls.gov/news.release/eccc.t01.htm> (accessed February 3, 2011). Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to \$33,723.20 per year.

Counsel submits copies of the first page of bank statements dated January 31, 2006, March 15, 2006, June 30, 2006, September 29, 2006, December 29, 2006, January 31, 2007, and April 30, 2007, in support of the appeal. However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. The petitioner's checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in these accounts are variable with balances fluctuating above and well below the proffered wage. Finally, the bank records are incomplete as the first page was the only portion of each respective bank statement that was submitted and many intervening months are omitted. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date.

Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L or either "Federal Tax Summary" in the record that is considered when determining the petitioner's net current assets.

Therefore, the AAO will not consider the petitioner's bank statements when evaluating the petitioner's continuing ability to pay the proffered wage to the beneficiary.

In the instant case, the record contains no evidence demonstrating that the petitioner has paid the beneficiary either the proffered wage of \$24,088.00 per year or the "fully burdened" wage rate of \$33,723.20 per year since the priority date. In addition, the petitioner failed to establish that it had sufficient net income in 2005, 2006, and 2007 to pay the beneficiary either the proffered wage of \$24,088.00 per year or the "fully burdened" wage rate of \$33,723.20 per year. Finally, the petitioner failed to demonstrate that it possessed sufficient net current assets to pay the beneficiary either the proffered wage of \$24,088.00 per year or the "fully burdened" wage rate of \$33,723.20 per year in 2006 and 2007.

Counsel is correct in asserting that 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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. Unlike *Sonogawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. Further, no evidence has been presented to show that the petitioner's owner is willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. Although counsel claims that the years 2006 and 2007 "...were tough years in the

industry in general...” the record is absent any evidence demonstrating that the petitioner suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage in 2006 and 2007. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

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 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.