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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**

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FILE:



Office: TEXAS SERVICE CENTER

Date: **MAR 22 2011**

IN RE:

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, 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

As set forth in the director's June 11, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$952 a week (\$49,504 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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 submits the petitioner's business checking bank statements for either the entire tax year or selected months during 2002 through 2008. He also submits a letter dated July 7, 2008 written by [REDACTED] CPA, [REDACTED]. [REDACTED] states that his company has been the petitioner's accountant for ten years and that the petitioner has shown a consistent solvency and stability with no known arrears with creditors. [REDACTED] adds that the petitioner had also shown its ability to pay all its employees and officers with no known payroll tax liabilities to date.

On appeal, counsel states that the petitioner's depreciation expenses and the amounts of officer compensation can be utilized to establish the petitioner's ability to pay the proffered wage. Other relevant evidence in the record includes the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001 to 2007, and copies of the beneficiary's W-2 Forms for tax years 2001 to 2007. In response to the director's RFE dated March 20, 2008, the petitioner also submitted a letter written by [REDACTED], the petitioner's owner/president, dated April 24, 2008. [REDACTED] stated that the petitioner's depreciation is not a loss and should be added to income, and states that if he were to add back depreciation expenses to the petitioner's income, and adjust the discretionary officer compensation, the petitioner would show a profit.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in July of 1955, and to currently employ eight to eleven workers.² According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 22, 2001, the beneficiary did not claim to have worked for the petitioner.

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The I-140 petition, Part 5, section 2 indicates the numbers "8" and "11" for current number of employees. The AAO presumes the petitioner means to indicate between eight and eleven workers.

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).

On appeal, counsel submits first pages of the petitioner's business checking account statements with [REDACTED] Bank from September 30, 2002 to December 31, 2002; January 31, 2004 to December 31, 2004; March 31, 2005 to December 31, 2005; January 31, 2006 to September 30, 2006; January 31, 2007 to December 31, 2007; January 31, 2008 to June 30, 2008. Counsel's reliance on the 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 return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 response to the director's RFE dated March 20, 2008, the petitioner provided the beneficiary's W-2 Forms for tax years 2001 to 2007. These documents indicate that the petitioner paid the beneficiary \$28,921.82 in 2001; \$30,855.45 in 2002; \$35,132.12 in 2003; \$37,317.05 in 2004; \$37,355.27 in 2005; \$33,752 in 2006; and \$46,294.56 in 2007. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$49,504 during any relevant timeframe including the period from the priority date in 2001 or subsequently. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage during the relevant period of time in question.³

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, contrary to counsel's assertion on appeal, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d

³ The differences between the beneficiary's actual wages and the proffered wage are as follows: \$20,582.18 in 2001; \$18,648.55 in 2002; \$14,371.88 in 2003; \$12,186.95 in 2004; \$12,148.73 in 2005; \$15,751 in 2006; and \$3,209.44 in 2007.

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 April 24, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's income

tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for tax years 2001 to 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income⁴ of -\$21,481.
- In 2002, the Form 1120S stated net income of -\$45,286.
- In 2003, the Form 1120S stated net income of \$8,887.
- In 2004, the Form 1120S stated net income of -\$103,538.
- In 2005, the Form 1120S stated net income of -\$100,016.
- In 2006, the Form 1120S stated net income of -\$66,603.
- In 2007, the Form 1120S stated net income of \$10,061.

Therefore, for the year 2007, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage of \$49,504. In tax years 2001 to 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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

- In 2001, the Form 1120S stated net current assets of -\$69,605.
- In 2002, the Form 1120S stated net current assets of -\$162,826.

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, or other adjustments shown on its Schedule K for tax years 2001, 2002, and 2005, the petitioner's net income is found on Schedule K of its tax returns for these years.

⁵According 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 2003, the Form 1120S stated net current assets of -\$98,763.
- In 2004, the Form 1120S stated net current assets of -\$67,728.
- In 2005, the Form 1120S stated net current assets of \$75,792.
- In 2006, the Form 1120S stated net current assets of \$45,545.

Therefore, for the years 2005 and 2006, the petitioner did have sufficient net current assets to pay the difference between the beneficiary's wages and the proffered wage of \$49,504. In tax years 2001 to 2004, the petitioner did not have sufficient net current assets to pay the difference.

Therefore, 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 wages paid to the beneficiary, or its net income or net current assets, except for tax years 2005 through 2007.

On appeal, counsel asserts that depreciation expenses may be utilized to establish the petitioner's ability to pay the proffered wage and that the petitioner may use depreciation and also officer compensation, a discretionary expense, to establish its ability to pay the proffered wage. As stated previously, USCIS does not consider depreciation when it examines the petitioner's net income. The AAO will discuss more fully the officer compensation issue raised by both counsel and the petitioner's owner in its consideration of the totality of the petitioner's circumstances.

Further, the AAO notes that counsel states that USCIS is bound by the DOL's certification of the instant labor certification, and that USCIS retains at least the burden of producing substantial evidence supporting its determination when it seeks to deny a visa petition. Both assertions are without merit.

The AAO will briefly provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved. As discussed previously, the Form ETA 750 in this matter is certified by the DOL. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of United States Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. USCIS also looks at whether a bona fide job offer exists. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

As counsel asserts on appeal, 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, on appeal, counsel states that the petitioner was established in 1955. The I-140 petition also indicates that the petitioner was established in July 1955. However, the state of New York corporate database indicates an initial New York Department of State (DOS) filing date for the petitioner of January 28, 1988. See <http://appext9.dos.state.ny.us/corp-public/corpsearch.entity-Information?> (Available as of February 16, 2011). Further, the petitioner's tax returns indicate an incorporation date of March 1, 1988. The petitioner's owner in his letter in response to the director's RFE also stated that his business began in 1988.

The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, counsel's assertion and the I-140 petition conflict with the petitioner's owner's statement with regard to the petitioner's longevity. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." Nevertheless, based on the state of New York corporate database, the petitioner has been in business since 1988, or 23 years.

The record does not contain any further evidence with regard to the petitioner's business operations or profile or reputation within the paving industry. The petitioner's business reputation with the paving industry, thus, is not established as a significant factor in the record when examining the petitioner's totality of circumstances.

The petitioner's gross receipts during tax years 2001 to 2007 are consistently high with a significant increase of \$300,000 only in tax year 2006. The petitioner posted almost identical gross profits in tax year 2001 as in tax year 2007. The petitioner's cost of labor, as identified on the petitioner's Schedules A, is modest.

With regard to officer compensation, the AAO notes that the petitioner identified officer compensation of \$19,715 on its tax return for 2001, a sum that is less than the difference between the beneficiary's actual wages and the proffered wage of \$49,501 in tax year 2001. In other years the officer compensation is still modest, ranging from \$30,000 to \$37,000, all sums lower than the proffered wage of \$49,504. When considering officer compensation, the AAO would require evidence such as a statement from the petitioner's officer demonstrating willingness and ability to forego the compensation, as well as evidence such as individual tax returns, and the officer's personal expenses. The petitioner would also have to provide evidence that the officer received the officer compensation. The record does not contain any further evidence with regard to officer compensation. In the instant matter, the AAO does not view the level of the petitioner's officer compensation as significant enough to warrant its use to establish the petitioner's 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.

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.