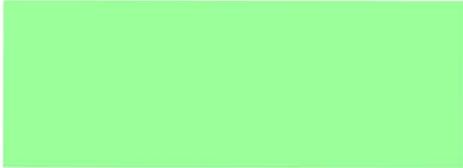




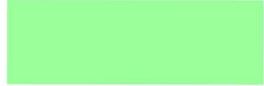
U.S. Citizenship  
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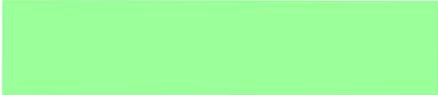
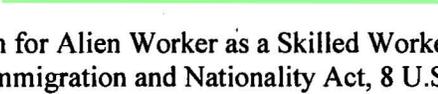
(b)(6)



Date: **APR 09 2012**

Office: NEBRASKA SERVICE CENTER

FILE: 

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

The petitioner is a restaurant. 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. 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 February 10, 2009 denial, the 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).

Here, the Form ETA 750 was accepted on January 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.59 per hour (\$26,187.20 per year).

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.<sup>1</sup>

The name listed for the petitioner on the Form I-140 is [REDACTED]. The name listed for the employer on the Form ETA 750 is [REDACTED]. The name listed for the taxpayer on the 2001 Form 1040 Schedule C and for the employer listed on the Form ETA 750 cover letter in the record of proceeding is [REDACTED]. The name listed for the taxpayer on the 2001 IRS Form 1120-A and the 2002 to 2007 IRS Forms 1120S federal income tax returns in the record is [REDACTED]. The federal employer identification number (EIN) listed for the petitioner on the Form I-140 and the taxpayer on the 2001 IRS Form 1040 is [REDACTED]. The EIN listed for the taxpayer on the IRS Form 1120-A for 2001 and the IRS Forms 1120S for 2002 to 2007 is [REDACTED]. The names and EINs on these documents are inconsistent.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The only evidence in the record to document the inconsistencies is a letter dated May 22, 2002 from an accountant, [REDACTED]. The letter indicates that the sole proprietorship incorporated on December 1, 2001 and transferred all operations to [REDACTED]. The AAO notes that this date is inconsistent with the date of incorporation, September 17, 2001, listed on the federal income tax returns for [REDACTED] that were also prepared by [REDACTED]. Further, no other evidence was submitted to document the incorporation of [REDACTED] any fictitious name for [REDACTED] the transactions involved regarding the transfer of the business and whether or not the transfer encompassed all of the rights and obligations of the sole proprietor.<sup>2</sup> The record does not

<sup>1</sup> 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).

<sup>2</sup> A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential

contain sufficient evidence to reconcile the inconsistencies. Without sufficient evidence to reconcile the inconsistencies, it has not been established that the federal income tax returns for [REDACTED] are sufficient evidence of the ability to pay of the petitioner,

[REDACTED] However, even if we assume that [REDACTED] became the successor-in-interest to the sole proprietorship on December 1, 2001 as stated by the petitioner's accountant, the petitioner has not established that the sole proprietorship or its successor-in-interest had the ability to pay the proffered wage.

On the petition, the petitioner claimed to currently employ four workers. According to the tax returns in the record, the fiscal years for [REDACTED] are based on a calendar year.

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'l Comm'r 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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, no evidence was submitted of wages paid to the beneficiary. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date of January 30, 2001 onward.

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

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business functions must remain substantially the same as before the ownership transfer. *See id.* at 482. In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 16, 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 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available.

The evidence indicates that [REDACTED] was structured as a sole proprietorship during a portion of 2001. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). 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'r 1984). Therefore the sole proprietor's adjusted gross income (AGI), assets and personal liabilities are also considered as part of the petitioner'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. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The petitioner did not provide a complete copy of the sole proprietor's individual federal income tax return for 2001. A copy of Schedule C to IRS Form 1040 was provided but no other pages. Without the complete return, we are unable to determine the proprietor's AGI in 2001. Further, no evidence was submitted to document the sole proprietor's expenses required to sustain himself and his dependents for 2001. Without evidence of the proprietor's expenses, it cannot be determined what portion of the proprietor's AGI is available to pay the proffered wage. Further, no evidence was submitted to document the sole proprietor's assets in 2001. Therefore, even if we assume that [REDACTED] became the successor-in-interest to the sole proprietorship on December 1, 2001 as stated by the petitioner's accountant, the petitioner has not established the sole proprietorship's ability to pay the proffered wage from January 30, 2001 to November 30, 2001.

The federal income tax returns of [REDACTED] indicate that the entity was incorporated in New Jersey on September 17, 2001 and made the S corporation election January 1, 2002.

The tax returns for [REDACTED] demonstrate its net income for 2001 to 2007, as shown in the table below.

- In 2001, the Form 1120-A stated net income<sup>3</sup> of \$0.
- In 2002, the Form 1120S stated net income<sup>4</sup> of \$5,214.

<sup>3</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return.

<sup>4</sup> 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.

- In 2003, the Form 1120S stated net income of \$25,736.
- In 2004, the Form 1120S stated net income of \$26,233.
- In 2005, the Form 1120S stated net income of \$18,386.
- In 2006, the Form 1120S stated net income of \$82,920.
- In 2007, the Form 1120S stated net income of \$105,884.

Therefore, even if we assume that [REDACTED] became the successor-in-interest to the sole proprietorship on December 1, 2001 as stated by the petitioner's accountant, for the period from December 1, 2001 to December 31, 2001 and for 2002, 2003 and 2005, [REDACTED] did not establish that it had sufficient net income to pay the proffered wage. For the years 2004, 2006 and 2007, [REDACTED] has established that it had 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.<sup>5</sup> On IRS Form 1120-A, a corporation's year-end current assets are shown on Page 2, Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13 and 14. On IRS Form 1120S, 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 tax returns for [REDACTED] demonstrate its end-of-year net current assets for 2001, 2002, 2003 and 2005, as shown in the table below.

- In 2001, the Form 1120-A stated net current assets of \$(17,563).
- In 2002, the Form 1120S stated net current assets of \$(17,521).
- In 2003, the Form 1120S stated net current assets of \$(18,005).

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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 (2002-2003), line 17e (2004-2005), or line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 19, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because A & A Porciello Foods of East Hanover had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2002 to 2007, its net income is found on Schedule K of its tax returns.

<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 2005, the Form 1120S stated net current assets of \$27,589.

Therefore, for the period from December 1, 2001 to December 31, 2001 and for 2002 and 2003, [REDACTED] did not establish that it had sufficient net current assets to pay the proffered wage. For 2005, [REDACTED] had sufficient net current assets to pay the proffered wage.

Therefore, even if we assume that [REDACTED] became the successor-in-interest to the sole proprietorship on December 1, 2001 as stated by the petitioner's accountant, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that the sole proprietorship or its successor corporation 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, net income or net current assets.

The petitioner submitted a copy of an unaudited profit and loss statement for [REDACTED] for 2001. Reliance on an unaudited financial statement is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner was not responsible for establishing ability to pay the proffered wage during the period of time before it incorporated. The fact that a business incorporated does not relieve the petitioner of having to establish eligibility. The regulations are clear that the petitioner must establish that it had had the continuing ability to pay the proffered wage from the time the priority date is established. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, counsel also asserts that the petitioner paid officer compensation which should be considered evidence of the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the IRS Form 1120-A and IRS Form 1120S. However, as previously noted, it has not been established that the federal income tax returns for [REDACTED] are evidence of the ability to pay of the petitioner, [REDACTED]. Therefore, the AAO will not consider the officers compensation paid to officers of [REDACTED] as evidence of the petitioner's ability to pay the proffered wage.

Even if we assume that [REDACTED] became the successor-in-interest to the sole proprietorship on December 1, 2001 as stated by the petitioner's accountant, the petitioner has not established that officer compensation may be considered evidence of the petitioner's ability to pay the proffered wage. The documentation presented here indicates that [REDACTED] each hold 50 percent of the stock of [REDACTED]. According to

the entity's IRS Forms 1120-A and 1120S line 12 (Compensation of Officers), [REDACTED] elected to pay officer compensation from 2001 to 2003 as shown in the table below.

- In 2001, officer compensation of \$3,150.
- In 2002, officer compensation of \$23,180.
- In 2003, officer compensation of \$16,900.

No evidence was provided regarding how much each officer received individually. No other evidence was submitted to document payment to either officer.

The record does not contain a statement from either officer documenting their willingness to forgo compensation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). Further, the record does not contain evidence to document that the officers are financially able to forgo compensation. No evidence was submitted to document either officer's financial position including income and expenses.

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 (Reg'l Comm'r 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 record does not establish how long the sole proprietorship had been in business prior to 2001. The petitioner claims to have four employees. The petitioner has not established that [REDACTED] is the sole proprietorship's successor-in-interest. However, even if we assume that [REDACTED] became the

successor-in-interest to the sole proprietorship on December 1, 2001 as stated by the petitioner's accountant, [REDACTED] paid minimal wages/costs of labor to all workers in each relevant year. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to document that the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.