

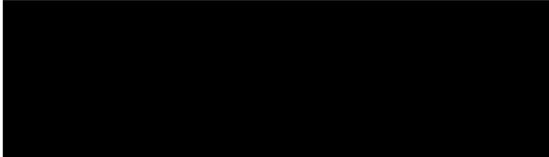
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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Date: JUN 21 2012

Office: TEXAS SERVICE CENTER

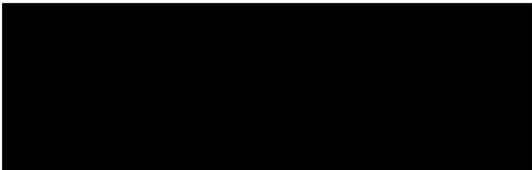


IN RE:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Elizabeth McCormack*

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 construction/restoration company. It seeks to employ the beneficiary permanently in the United States as an ornamental stone restorer, DOT job code 861.381-038 (stonemason). 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).<sup>1</sup> The Texas Service Center Director (the director) denied the petition, finding that the petitioner failed to establish by a preponderance of the evidence that it had the ability to pay the proffered wage of the beneficiary beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

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 May 12, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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<sup>1</sup> USCIS records show that the labor certification accompanying the petition in this case was previously used to support another employment-based immigrant visa petition filed in 2005 (File [REDACTED]). On December 15, 2005 the Vermont Service Center director denied the petition finding that the petitioner had failed to establish the continuing ability to pay the beneficiary's proffered wage from the priority date. The petitioner appealed the director's decision (File [REDACTED]) to the AAO, and the AAO dismissed the appeal on August 17, 2007.

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 (Acting Reg'l Comm'r 1977).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by the DOL on April 30, 2001. The AAO notes that a company called [REDACTED] filed the Form ETA 750. The rate of pay or the proffered wage specified on the Form ETA 750 is \$28.61 per hour or \$59,508.80 per year. In the Form ETA 750, [REDACTED] specified that all job applicants in order to qualify for the position should have at least two years of work experience in the job offered.

To show that the petitioner has the continuing ability to pay \$28.61 per hour or \$59,508.80 per year from April 30, 2001, the petitioner submitted copies of the following evidence:

- Forms 1120, U.S. Corporation Income Tax Return for an S Corporation, for the years 2004 through 2007;
- Bank statements from 2003 to 2008; and
- A letter dated December 11, 2007 from the [REDACTED] the petitioner's certified public accountant (CPA), stating that [REDACTED] and the petitioner have the continuing ability to pay the beneficiary's wage from the priority date.

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 on January 14, 2003, to currently employ 12 people, and to have gross annual income and net annual income of \$909,178 and \$4,023, respectively.

The record contains copies of Forms 1120, U.S. Corporation Income Tax Return, of [REDACTED] for the years 1999 through 2004.<sup>2</sup> In denying the petition, the director considered the tax returns of [REDACTED] and the petitioner.

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>3</sup>

Upon *de novo* review and beyond the decision of the director, the AAO determines that [REDACTED] and the petitioner are two distinct and separate entities,<sup>4</sup> and thus, no tax returns of [REDACTED] can be considered in establishing the petitioner's ability to pay.

A valid successor relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization (the petitioner) must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the petitioner – must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization (the petitioner) not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the

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<sup>2</sup> [REDACTED] has the following Employer Identification Number (EIN) according to the tax returns submitted: 11-3382709.

<sup>3</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>4</sup> The EIN of [REDACTED] is [REDACTED] while the EIN of the petitioner is [REDACTED]. Further, the physical location of the two companies are different [REDACTED] maintained an office address at [REDACTED]; the petitioner's office address is at [REDACTED]. In addition, according to the New York Department of State, Division of Corporations, [REDACTED] was incorporated on June 6, 1997 and dissolved as of August 1, 2007. *See* [http://www.dos.state.ny.us/corps/bus\\_entity\\_search.html](http://www.dos.state.ny.us/corps/bus_entity_search.html) (last accessed June 11, 2012). On the other hand, the petitioner's business status according to the New York Department of State, Division of Corporations is active. *See* [http://www.dos.state.ny.us/corps/bus\\_entity\\_search.html](http://www.dos.state.ny.us/corps/bus_entity_search.html) (last accessed June 11, 2012).

predecessor company. The new organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Here, the record contains no evidence of transfer of ownership or assumption of rights, duties, and obligations between [REDACTED] and the petitioner. [REDACTED] owner of [REDACTED] wrote and signed a sworn statement on November 29, 2004, in which he stated that [REDACTED] and [REDACTED] (the petitioner) merged to expand their business and exposure in the restoration field. He further declared that no skilled workers were fired or suspended due to the merger and that after the merger the merged company retained the same employees and working conditions, and therefore concluded that [REDACTED] is the successor-in-interest to [REDACTED].

No supporting documentation, however, has been submitted to corroborate the veracity of the assertions. In *Matter of Dial Auto, id.* the petitioner in that case had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true; the Commissioner, consequently, dismissed the appeal and denied the petition. Similarly, in this case [REDACTED] sworn statement alone is not reliable. 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)).

In addition, the merger was not acknowledged by the DOL. The DOL, when it certified the Form ETA 750 after the date of the stated merger, did not change the name of the filer. The labor certification was issued to [REDACTED] and not to the petitioner. Thus the petition is not accompanied by a valid labor certification. See 8 C.F.R. § 204.5(1)(3); see also 8 C.F.R. § 204.5(a)(2), which states, "A petition is considered properly filed if it is accompanied by any required individual labor certification." As the petition is not accompanied by a labor certification approved for use by the petitioner and since the petitioner is not the successor-in-interest to [REDACTED] the petitioner is not entitled to use the labor certification. For this reason, the appeal must be dismissed, and the petition denied.<sup>5</sup>

Further, even if we consider the tax returns of [REDACTED] the AAO finds that the petitioner does not have the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains his lawful permanent residence.

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.

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<sup>5</sup> The petitioner should address this issue in any further proceedings.

Here, no evidence has been submitted to show that the beneficiary is an employee and/or that he has received compensation from the petitioner during the qualifying period. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay \$28.61 per hour or \$59,508.80 per year from April 2001 until the beneficiary obtains his lawful permanent residence. The petitioner can pay these amounts through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will 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 (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 tax returns submitted demonstrate the net income (loss) for the years 2001 through 2007, as shown below:

<i>Company</i>	<i>Tax Year</i>	<i>Net Income (Loss) – in \$</i>	<i>The Annual Proffered Wage – in \$</i>
[REDACTED]	2001	4,019 <sup>6</sup>	59,508.80 per year
	2002	0	59,508.80 per year
	2003	2,647	59,508.80 per year
	2004	50	59,508.80 per year
	2004	4,023 <sup>7</sup>	59,508.80 per year
	<b>Petitioner</b>	2005	0 <sup>8</sup>
<b>Petitioner</b>	2006	(6,827)	59,508.80 per year
<b>Petitioner</b>	2007	(5,225)	59,508.80 per year

Therefore, neither [REDACTED] nor the petitioner had sufficient net income to pay the beneficiary’s proffered wage during the qualifying period from the priority date.

<sup>6</sup> 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.

<sup>7</sup> [REDACTED] changed its fiscal year from middle calendar year (June 1 to May 31) to calendar year (January 1 to December 31) and filed another tax return in 2004.

<sup>8</sup> For an S Corporation, 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 if the S corporation’s income is exclusively from a trade or business. 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 18 of Schedule K (2006-2010). See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income from 2005 to 2007 is found on line 17e and 18 of schedule K.

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>9</sup> 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 for the years 2006 through 2009, as shown below:

<i>Company</i>	<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>The Annual Proffered Wage – in \$</i>
	2001	(26,226)	59,508.80 per year
	2002	(34,641)	59,508.80 per year
	2003	(17,012)	59,508.80 per year
	2004	(8,629)	59,508.80 per year
	2004	(8,448)	59,508.80 per year
<b>Petitioner</b>	2005	(10,249)	59,508.80 per year
<b>Petitioner</b>	2006	(31,626)	59,508.80 per year
<b>Petitioner</b>	2007	(43,605)	59,508.80 per year

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's proffered wage during the qualifying period from the priority date. Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

On appeal, counsel for the petitioner contends that the petitioner could use the money paid to other subcontractors to pay the beneficiary's wage.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence in the record showing that the subcontractors performed the beneficiary's duties. If the subcontractor mentioned by [redacted] performed other kinds of work, such as bookkeeping, for instance, then that worker would not qualify to temporarily work for the beneficiary. In addition, we note that the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.

<sup>9</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.

Even though this consideration does not form the basis of the decision on the instant appeal, we decline to accept counsel's contention as persuasive.

On appeal, counsel refers to bank statements that the petitioner maintained from 2003 to 2008. Counsel asserts that the petitioner has sufficient cash on hand to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept or the petitioner to submit additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for the years 2005 through 2007 and the tax returns of ██████████ for the years 1999 through 2004. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's or ██████████ bank statements somehow reflect additional available funds that were not reflected on its tax returns or in the cash entry on Schedule L. Further, the bank statements only show balances in the petitioner's or ██████████ bank account in a particular time period. They do not explain how those balances can help the petitioner pay the proffered wage during the qualifying period from the priority date. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay.

On appeal, the petitioner's CPA states that non-cash expenses such as depreciation should not be included in calculating the petitioner's net income.

The AAO declines to accept the CPA's statement as persuasive, as the court in *River Street Donuts* has held that depreciation represents an actual cost of doing business – “a real expense” – and thus, it should not be added back to boost or reduce the company's net income or loss. *River Street Donuts* at 118. Additionally, it has been the AAO's policy since 2003 not to add amounts deducted for depreciation to net income to determine a petitioner's financial capacity to pay the proffered wage. *Id.*

Finally, 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

*Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

Unlike *Sonegawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until each beneficiary receives or received his or her permanent residence.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.