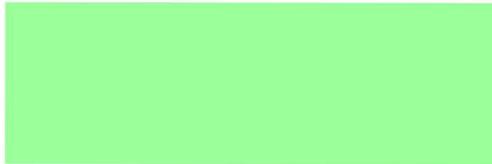


(b)(6)

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

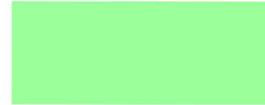


U.S. Citizenship
and Immigration
Services

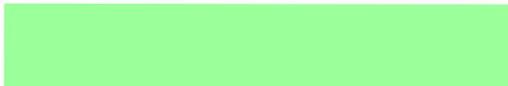


DATE **SEP 04 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

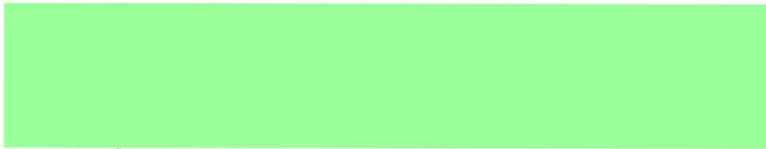


IN RE: Petitioner:
Beneficiary:



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 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,

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 April 28, 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.

At the outset, the appeal must be dismissed because the entity that filed the petition and accompanying labor certification, [REDACTED] does not appear to currently exist. According to the State of Michigan's Department of Licensing and Regulatory Affairs' website, there is no limited liability company with the name [REDACTED]. There was a [REDACTED] at the petitioner's address, but the company was dissolved on July 15, 2006. The submitted tax returns, Form I-290B and Forms W-2 submitted on appeal are for a company named [REDACTED].

The appellant, [REDACTED] failed to establish that it is the same entity as, or a successor-in-interest to, the entity that filed the petition and labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

On July 12, 2012, the AAO sent the petitioner a Notice of Intent to Dismiss, Request for Evidence and Notice of Derogatory Information (Notice). In the Notice, the AAO stated:

The sponsoring employer's name stated on the petition and the ETA Form 9089 is [REDACTED] (EIN [REDACTED]). The AAO searched the State of Michigan's Department of Licensing and Regulatory Affairs' website and did not find a listing for a limited liability company with the name [REDACTED]. Additionally, no listing was found for a corporation named [REDACTED] (purportedly a C corporation with the same EIN number), which is listed on the submitted tax returns, Form I-290B and Forms W-2 submitted on appeal.

However, a listing for the corporation [REDACTED] was found and its address matches the petitioner's address. The corporation's status is listed as automatic dissolution as of July 15, 2006. A copy of the status report for your organization is attached.

If your organization is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of your organization's business. See 8 C.F.R. § 205.1(a)(iii)(D).

Moreover, any concealment of the true status of your organization seriously compromises the credibility of the remaining evidence in the record. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). You must resolve any inconsistencies in the record with independent, objective evidence. *Id.*

Because the instant appeal may be moot, the AAO has not fully examined the merits of your appeal. If you intend to continue your appeal, you must demonstrate the continued existence, operation, and good standing of your organization. Such evidence must include, but is not limited to

- Explanation of the use of the name [REDACTED] (based on its name, a limited liability company) and [REDACTED] (based on the tax returns, a C corporation), and whether these entities related to John's Country [REDACTED]
- Verifiable documentary evidence which demonstrates that John's Country [REDACTED] are the same entity;
- Verifiable documentary evidence which demonstrates that [REDACTED] are authorized to conduct business in the State Michigan; and
- Verifiable documentary evidence which demonstrates that [REDACTED] are properly using the Federal Employer Identification Number ([REDACTED])

In response to the AAO's Notice, the petitioner, through counsel, responded with a letter dated July 10, 2012. In the letter, counsel states

We believe that a simple mistake was made from the beginning. The business trade name used by [REDACTED] was [REDACTED]. For an unexplained reason, LLC was added. He never owned and never filed any application for [REDACTED]. The papers you provided indicate that a gentleman named [REDACTED] formed this corporation on 06/09/2003.

The actual business corporation is [REDACTED] and the proper FEIN number is [REDACTED] was assigned to this corporation on 01/20/2004 . . .

Counsel explains it was a mistake that caused the name [REDACTED] to be used. The "LLC" was listed on the Form ETA 9089, the Form I-140, and the Form G-28, all of which were signed by the business owner, [REDACTED]. Counsel simply states that [REDACTED] never filed an application for [REDACTED] but provides no explanation why a business with that name was registered to conduct business in Michigan at the exact address of the petitioner's restaurant from June 2003 until it was automatically dissolved in July 2006. 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).

Counsel submitted a copy of Articles of Incorporation for [REDACTED] with a handwritten date of the "26th day of December 2003." However, the Articles of Incorporation on file with the Michigan Secretary of State state that it was filed on July 2, 2012 and shows the signatures were made on the "26th day of June 2012" and the date was typed, not handwritten. See http://www.dleg.state.mi.us/bcs_corp/sr_corp.asp (last accessed on August 1, 2012). Therefore, the Articles of Incorporation submitted to the AAO by counsel are identical to the document on the State of Michigan website, except the date on the document provided by counsel has a handwritten date that is several years earlier. Any inconsistencies in the record must be resolved by independent, objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the submitted proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Also submitted in response to the AAO's Notice was a lease dated November 15, 2011, a security agreement dated October 20, 2003, an invoice for a food delivery dated June 27, 2012, a Food Service Establish permit which expired on April 30, 2012, and an energy bill for the billing period of May 15, 2012 through June 13, 2012. Each of these documents is addressed to or signed by [REDACTED] individually, and does not mention [REDACTED]. This casts further doubt on the existence of a corporation named [REDACTED] doing business as [REDACTED] at the time counsel claims.

In this case, the petitioner's submission of altered documents in response to the AAO's Notice casts doubt on the veracity of the evidence in the record, including the copy of a letter from the U.S. Internal Revenue Service which appears to show the EIN of [REDACTED] was assigned to [REDACTED] on January 20, 2004.

Therefore, the appeal must be dismissed because the evidence in the record fails to establish that the entity that filed the petition and accompanying labor certification is in existence, and/or that the appellant is a successor-in-interest to the petitioner.

Even if it were concluded that [REDACTED] were the same entity as, or a successor-in-interest to the petitioner, the director correctly denied the petition on ability to pay grounds. The regulation 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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).

Here, the ETA Form 9089 was accepted on May 31, 2006. The proffered wage as stated on the ETA Form 9089 is \$11.24 per hour. The prevailing wage request form was included in the record and shows that the position was listed as requiring 36 hours per week. Thus, the proffered wage equals \$404.64 per week or \$21,041.28 per year. The ETA Form 9089 states that the position requires 24 months in the job offered of restaurant cook.

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

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 October 15, 2003. The petitioner omitted information on the petition for its gross annual income and its current number of employees. According to the tax return in the record, the petitioner's fiscal year is the calendar year from January 1 to December 31. On the ETA Form 9089, signed by the beneficiary on May 16, 2006, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition

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).

later based on the ETA Form 9089, 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 Sonogawa*, 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of May 31, 2006.

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), *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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

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. The record before the director closed on September 10, 2007. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. The petitioner’s tax return demonstrates its net income for 2006, as shown below.

- In 2006, the Form 1120 stated net income of \$5,326.

Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage of \$21,041.28 per year.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.² A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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

²According 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.

wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets for 2006 as shown below:

- In 2006, the Form 1120 stated net current assets of (\$4,784).

Therefore, for the year 2006, the petitioner did not have sufficient net current assets to pay the proffered wage of \$21,041.28 per year.

Therefore, from the date the ETA Form 9089 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.

Counsel asserts in his brief accompanying the appeal that the director erred in his conclusion that the petitioner could not pay the proffered wage at the time of the priority date. He emphasizes that the labor certification lists an hourly wage of \$11.24, not an annual wage, and that the petitioner had only provided the director its 2006 tax return. Counsel states that, in the period between the filing of the petition and the time of the director's decision, the director "never requested, in almost two years, any proof [of] whether the petitioner has employed or has paid the beneficiary the proffered wage. Instead, without issuing a request for evidence [RFE], the petition was simply denied." Counsel submitted pay statements and Forms W-2 and 1099 issued by the petitioner to the beneficiary on appeal.

Counsel cites the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of his assertion that it was improper for the director to issue a decision based solely on the petitioner's tax return. This decision was remanded and the most recent decision is *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990). The holding in that case is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. Instead, the holding is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage. Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets. Further, the AAO will consider the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As is explained above, this approach has been repeatedly upheld by federal courts.

The petitioner also cites the DOL Board of Alien Labor Certification Appeals (BALCA) case, *In the Matter of: Maysa, Inc., Employer on Behalf of: Majdi Mahmoud Wadi, Alien*, 98-INA-259, 1999 WL 355170 (Bd. Alien Lab. Cert. App. May 21, 1999) in support of his assertion that an ability to pay determination should be "forward-looking." While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

It is also noted that if all required initial evidence is not submitted with the petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007).

The evidence submitted by the petitioner on appeal consisted of the beneficiary's 2007 and 2008 Forms W-2 from the petitioner, her 2008 Form 1099 from the petitioner, and five earnings statements. One earnings statement, with the payment date of November 23, 2007, states that the beneficiary's gross pay was \$810 for that pay period and her gross year-to-date pay was also \$810. This indicates that the beneficiary started working for the petitioner in November 2007. The beneficiary's 2007 Form W-2 shows that she earned a total of \$2,430 from the petitioner that year.

There are only two earnings statements from 2008 in the record. The first, with the payment date of January 4, 2008, states that the beneficiary's gross pay was \$810. The second, with the payment date of March 28, 2008, states her gross pay was \$810 and that her year-to-date gross pay was \$4,860. Her 2008 Form W-2 also shows her total wages were \$4,860. This indicates that the beneficiary was paid as an employee until March of 2008. No other earnings statements appear in the record, but the 2008 Form 1099 shows that the beneficiary earned \$15,390 as nonemployee compensation that year. Thus the total compensation paid to the beneficiary in 2008 was \$20,250.

Counsel asserts that USCIS should focus an analysis of the petitioner's ability to pay the proffered wage on the five earnings statements submitted. Since those earnings statements show that the beneficiary was paid \$810 for each two-week pay period, then, counsel asserts, the petitioner has demonstrated its ability to pay the proffered wage of \$11.24 per hour for 36 hours per week.

The petitioner must establish its ability to pay the proffered wage from the time of the priority date until the beneficiary becomes a lawful permanent resident. Counsel's argument ignores the fact that the beneficiary's earnings statements cover a short period which begins more than a year after the priority date.

Finally, counsel argues that the totality of circumstances standard should be used, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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. 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, despite counsel's reference to *Sonegawa*, he fails to state specific factors which should be considered in the totality of circumstances analysis. The record lacks evidence of the petitioner's reputation, historical growth, or any other factor which supports a conclusion that the totality of circumstances demonstrates the petitioner had the continuing ability to pay the proffered wage from the time of the priority date. 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner which demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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.