

(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:

JAN 24 2013

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 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,

  
Ron Rosenberg

Acting 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 home healthcare services company. It seeks to employ the beneficiary permanently in the United States as a human resources manager. 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 18, 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). 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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$31.94 per hour (\$66,435.20 per year based on 40 hours per week).<sup>1</sup> The Form ETA 750 states that the position requires a high school diploma and two years of experience in the job offered as a human resources manager. The Form ETA 750 also states that a bachelor's degree in human resource management may be substituted in lieu of two years of experience as a human resources manager.

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>2</sup>

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 February 1996<sup>3</sup> and to currently employ 70 workers. 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 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1998 and continuing at least until the date the labor certification was signed, on April 25, 2001.

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 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 submitted the

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<sup>1</sup> The labor certification states that overtime will be compensated at "1 ½" per hour as needed.

<sup>2</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>3</sup> The petition originally stated that the petitioner was established in February 1998. In response to a Request for Evidence (RFE) issued by the AAO on October 3, 2012, the petitioner submitted a copy of its Articles of Incorporation, documenting that the petitioner was established in February 1996.

beneficiary's Forms W-2 and Form 1099 for 2001 through 2011. The beneficiary's Forms W-2 and Form 1099 demonstrate that the beneficiary was compensated by the petitioner as shown in the table below.

- In 2001, the Form 1099 stated wages of \$6,000.00.
- In 2002, the Form W-2 stated wages of \$12,000.00.
- In 2003, the Form W-2 stated wages of \$9,000.00.
- In 2004, the Form W-2 stated wages of \$4,500.00.
- In 2005, the Form W-2 stated wages of \$7,000.00.
- In 2006, the Form W-2 stated wages of \$24,500.00.
- In 2007, the Form W-2 stated wages of \$30,000.00.
- In 2008, the Form W-2 stated wages of \$30,269.60.
- In 2009, the Form W-2 stated wages of \$30,000.00.
- In 2010, the Form W-2 stated wages of \$30,000.00.
- In 2011, the Form W-2 stated wages of \$30,000.00.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date. The petitioner must demonstrate its ability to pay the beneficiary the difference between the proffered wage and wages already paid to the beneficiary for 2001 through 2011.

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 (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 AAO closed on November 16, 2012 with the receipt by the AAO of the petitioner’s submissions in response to the AAO’s request for evidence (RFE) on October 3, 2012. As of that date, the petitioner’s 2012 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2011 is the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>4</sup> of -\$80,836.
- In 2002, the Form 1120S stated net income of -\$13,005.

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<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. 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), or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 18, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2007 and 2009 through 2011, the petitioner’s net income is found on Schedule K of its 2001 through 2007 and 2009 through 2011 tax returns.

- In 2003, the Form 1120S stated net income of -\$9,979.
- In 2004, the Form 1120S stated net income of -\$14,683.
- In 2005, the Form 1120S stated net income of \$82,203.
- In 2006, the Form 1120S stated net income of \$89,049.
- In 2007, the Form 1120S stated net income of \$23,671.
- In 2008, the Form 1120S stated net income of -\$353,576.
- In 2009, the Form 1120S stated net income of -\$57,149.
- In 2010, the Form 1120S stated net income of \$17,646.
- In 2011, the Form 1120S stated net income of \$115,987.

Therefore, for the years 2001, 2002, 2003, 2004, 2007, 2008, 2009, and 2010, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary.

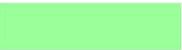
As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are 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 -\$190,951.
- In 2002, the Form 1120S stated net current assets of -\$223,374.
- In 2003, the Form 1120S stated net current assets of -\$248,499.
- In 2004, the Form 1120S stated net current assets of -\$225,797.
- In 2007, the Form 1120S stated net current assets of -\$126,125.
- In 2008, no Schedule L was submitted.
- In 2009, the Form 1120S stated net current assets of -\$153,068.
- In 2010, the Form 1120S stated net current assets of -\$217,820.

Therefore, for the years 2001, 2002, 2003, 2004, 2007, 2008, 2009, and 2010, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary.

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<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.



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.

On appeal, counsel states that the petitioner does have the ability to pay the beneficiary the proffered wage. In the initial brief dated March 17, 2009, former counsel asserts that the director failed to properly consider the amounts listed under officer compensation. On October 3, 2012, the AAO issued an RFE for additional documentation regarding officer compensation. The petitioner responded on November 16, 2012.

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 Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. In the instant case, Schedule K-1 of the petitioner's 2001 through 2011 federal tax returns show the following shareholders and percentage of stock ownership.<sup>6</sup>

Tax Year				
2001	85.0%	15.0%		
2002	85.0%	15.0%		
2003	85.0%	15.0%		
2004	84.5%	15.0%	0.3%	0.2%
2007	85.0%	15.0%		
2008				
2009	67.0%	33.0%		
2010	67.0%	33.0%		
2011		33.0%		

The petitioner's tax returns demonstrate its compensation of officers as shown in the table below.

- In 2001, line 7 of page one on the Form 1120S showed compensation of officers of \$275,975.
- In 2002, line 7 of page one on the Form 1120S showed compensation of officers of \$152,200.
- In 2003, line 7 of page one on the Form 1120S showed compensation of officers of \$193,575.
- In 2004, line 7 of page one on the Form 1120S showed compensation of officers of \$615,413.
- In 2007, line 7 of page one on the Form 1120S showed compensation of officers of \$305,990.
- In 2008, line 7 of page one on the Form 1120S showed compensation of officers of \$121,905.
- In 2009, line 7 of page one on the Form 1120S showed compensation of officers of \$65,000.
- In 2010, line 7 of page one on the Form 1120S showed compensation of officers of \$108,000.

<sup>6</sup> The petitioner's 2008 and 2011 tax returns did not include Schedule K-1 for all shareholders.

- In 2011, line 7 of page one on the Form 1120S was blank.

In response to the AAO's RFE, a statement dated November 12, 2012 was submitted from [REDACTED] stating that she now owns 100% of the petitioner. [REDACTED] states, "... our company is able and willing to pay the difference between wages paid to the beneficiary and the proffered wage when the beneficiary obtains his permanent resident status... As [REDACTED] is no longer with the company, we cannot provide copies of documents being required from her such as monthly expenses and other tax returns." The petitioner included copies of [REDACTED] Forms W-2 for 2003 through 2010. No statement was submitted from any of the shareholders indicating that they would have been willing to forego compensation to pay the difference between wages paid to the beneficiary and the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner also failed to provide photocopies of any of the shareholder's individual federal tax returns (Forms 1040) for the years 2001 through 2004 and 2007 through 2010 and statements listing their monthly expenses for each of the relevant years. Without the requested evidence, the AAO is unable to determine that the petitioner's officer compensation was available to pay the proffered wage.

The petitioner's new counsel submitted a subsequent brief dated November 14, 2012 in response to the AAO's RFE. In the brief, counsel states that the petitioner has established the ability to pay through its bank statements. Counsel also states, "The petitioner's obligation to pay the proffered wage rate is when the beneficiary gets his permanent resident card." As noted above, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The priority date 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). In the instant case, the petitioner must demonstrate its ability to pay the proffered wage from the priority date of April 27, 2001 and continuing until the beneficiary obtains permanent residence.

Counsel submitted the petitioner's bank statements from 2001 through 2011. Counsel's reliance on the balances in the petitioner's bank accounts 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(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.<sup>7</sup>

<sup>7</sup> It is noted that the cash listed on the petitioner's Schedule L for 2002, 2004, 2007, 2009, and 2010 differs significantly from the end-of-year cash balances noted on its bank statements. In 2002, the petitioner reported cash assets of -\$20,672 on Schedule L; however, the petitioner's bank statements show a closing balance of December 31, 2002 of \$24,182.41. In 2004, the petitioner reported cash assets of -\$20,728 on Schedule L; however, the petitioner's bank statements show a closing balance

Counsel also points to the amount of salaries and wages the petitioner pays yearly, stating “The Petitioner is a home health agency and paid about \$897,575.00 in salaries and wages to its staff in 2011... The number of employees and independent contractors (more than 100 workers each year) they employ yearly is clearly shown by the amount of salaries and wages they pay yearly.” As discussed above, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

Counsel’s assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.

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of December 31, 2004 of \$38,393.39. In 2007, the petitioner reported cash assets of \$41,703 on Schedule L; however, the petitioner’s bank statements show a closing balance of December 31, 2007 of \$165,189.83. In 2009, the petitioner reported cash assets of \$88,935 on Schedule L; however, the petitioner’s bank statements show a closing balance of December 31, 2009 of \$161,371.07. In 2010, the petitioner reported cash assets of -\$13,078 on Schedule L; however, the petitioner’s bank statements show a closing balance of December 31, 2010 of \$27,250.38. It 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In the instant case, the petition shows that the petitioner has been in business since 1996. The tax returns for 2001 through 2004 and 2007 through 2010 fail to demonstrate the ability to pay the beneficiary the proffered wage through net income or net current assets. A review of the petitioner's tax returns shows a decrease in gross receipts of more than 20 percent from 2001 to 2011. Further, the petitioner's net current assets were negative from 2001 through 2011 and net income was negative in 2001, 2002, 2003, 2004, 2008 and 2009. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. Counsel also failed to provide evidence of any factors that may have impacted the petitioner during the relevant years. 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.