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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

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,

Rachel M. Hines
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Korean rice cake bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 and 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 8, 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 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 February 13, 2004. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour (\$33,280.00 per year based upon a 40-hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered as a baker.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, the petitioner submits a brief; checking account statements for 2004, 2005, 2006, and 2007; and a copy of a certificate of deposit statement. On May 31, 2012, the AAO issued request for evidence (RFE), asking the petitioner to supply evidence of its personal, unencumbered, and liquefiable assets, which could reasonably be applied towards paying employee wages for 2007, 2008, 2009, 2010, and 2011. In the AAO's request, it indicated that, if the petitioner intended to supply bank statements, it should supply all twelve monthly statements for each year. The AAO also requested that the petitioner supply its U.S. Individual Income Tax Returns for 2008, 2009, 2010, and 2011 as well as a list of itemized, personal, monthly expenses for 2008, 2009, 2010, and 2011. Additionally, the AAO requested that the petitioner supply evidence of any wages paid to the beneficiary, in the form of IRS Form W-2 or 1099 for 2009, 2010, and 2011.

In its response, the petitioner supplied bank account, checking account, and certificate of deposit statements for 2007, 2008, 2009, 2010, and 2011; its Individual Income Tax Returns (Form 1040) for 2008, 2009, 2010, and 2011; copies of IRS Forms W-2, which it issued to the beneficiary in 2008, 2009, and 2010; and a copy of an IRS Form 1099, which it issued to the beneficiary in 2008.

On appeal, counsel asserts that the petitioner had sufficient cash on hand, as reflected in its personal bank accounts, to pay the beneficiary the proffered wage in 2004, 2005, and 2006. On appeal, counsel also asserts that the petitioner had sufficient funds in its bank accounts to pay the beneficiary the proffered wage or the difference between wages already paid and the full proffered wage for all other years. In the decision to deny the petition, the director noted claims which the sole proprietor made regarding the amount of funds held in his personal savings and checking accounts. The director indicated that, if the maintenance of such funds could be established, the petitioner could demonstrate the ability to pay for the years 2004 through 2006. Counsel asserts that the evidence supplied on appeal demonstrates that the petitioner had such ability.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1987 and currently to employ two workers.² On the Form ETA 750B, signed by the beneficiary on January 4, 2004, the beneficiary did not claim to have worked for the petitioner.

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

² Although the petitioner asserts that it employs two workers, its Schedule C does not identify any

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 provided copies of IRS Forms W-2, which it issued to the beneficiary in 2008, 2009, and 2010 as well as a copy of IRS Form 1099, which the petitioner issued to the beneficiary in 2008.³ The beneficiary's IRS Forms W-2, Wage and Tax Statements, and IRS Form 1099 show compensation received by the beneficiary from the petitioner as shown in the table below.

- In 2008, Forms W-2 and 1099 reflect combined compensation of \$27,900.00.
- In 2009, Form W-2 shows compensation of \$33,600.00.
- In 2010, Form W-2 shows compensation of \$19,600.00.
- In 2011, the petitioner provided no regulatory-prescribed evidence of wages paid to the beneficiary.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2004 through 2008 as well as in 2010 through 2011. Therefore, the petitioner must demonstrate the ability to pay the beneficiary the full proffered wage in 2004, 2005, 2006, 2007, and 2011, and it must demonstrate the ability to pay the beneficiary the

wages paid for 2004, 2005, 2006, or 2007. The first year for which wages were paid was 2008, and those wages were paid to the beneficiary of the instant visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

³ The petitioner provided evidence of wages paid to the beneficiary beginning in 2008 and continuing through 2010. The sums represented on the W-2 and 1099 statements are identical to the total amount of wages paid during each of the years from 2008 through 2010, thus indicating that the beneficiary was the petitioner's only employee. The petitioner provided no evidence of wages paid to the beneficiary in 2011. In addition, Schedule C for 2011 contains no amount for wages paid.

difference between wages already paid and the full proffered wage for 2008 and 2010, that difference being \$5,380.00 and \$13,680.00, respectively.

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).

The petitioner is a sole proprietorship, 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, 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 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of four in 2004, 2005, and 2006; a family of three from 2007 to 2008; and a family of two from 2010 through 2011. The proprietor's tax returns reflect the following information for the following years:

- In 2004, the petitioner's IRS Form 1040, line 36, stated adjusted gross income of \$50,020.00.
- In 2005, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$52,267.00.
- In 2006, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$56,015.00.
- In 2007, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$61,131.00.
- In 2008, the petitioner's IRS Form 1040, line 37, stated adjusted gross income of \$64,236.00.
- In 2010, the petitioner's IRS Form 1040, line 27, stated adjusted gross income of \$73,106.00.

- In 2011, the petitioner's IRS Form 1040, line 27, stated adjusted gross income of \$90,775.00.

As a sole proprietor, the petitioner must demonstrate not only the ability to pay the beneficiary from his adjusted gross income, but also the ability to support his household. In order to make such a demonstration, the sole proprietor must enumerate and document his recurring, monthly, household expenses. The petitioner provided a list of his recurring, monthly, household expenses for each year from 2004 through 2008 and from 2010 through 2011. The figures for such expenses are reflected in the table below.

- In 2004, the annual total of the petitioner's recurring, monthly expenses is \$68,048.33.
- In 2005, the annual total of the petitioner's recurring, monthly expenses is \$72,002.73.
- In 2006, the annual total of the petitioner's recurring, monthly expenses is \$67,547.29.
- In 2007, the annual total of the petitioner's recurring, monthly expenses is \$67,268.24.
- In 2008, the annual total of the petitioner's recurring, monthly expenses is \$70,863.52.
- In 2010, the annual total of the petitioner's recurring, monthly expenses is \$78,350.94.
- In 2011, the annual total of the petitioner's recurring, monthly expenses is \$77,370.89.

Therefore, after paying for his recurring, monthly household expenses, the sole proprietor would have had been left with the following amounts for the following years:

- In 2004, the sole proprietor had a deficit of \$18,028.33.
- In 2005, the sole proprietor had a deficit of \$19,735.73.
- In 2006, the sole proprietor had a deficit of \$11,532.59.
- In 2007, the sole proprietor had a deficit of \$6,137.24.
- In 2008, the sole proprietor had a deficit of \$6,627.52.
- In 2010, the sole proprietor had a deficit of \$5,244.94.
- In 2011, the sole proprietor had a surplus of \$13,404.11.

Therefore, considering the wages owed to the beneficiary, when combined with the funds remaining (or the deficit) after the sole proprietor covered its recurring, monthly, household expenses, the sole proprietor still requires the following amounts for the following years.

- For 2004, the petitioner still requires \$51,278.33.
- For 2005, the petitioner still requires \$53,015.73.
- For 2006, the petitioner still requires \$44,812.59.
- For 2007, the petitioner still requires \$39,417.24.
- For 2008, the petitioner still requires \$12,007.52.
- For 2010, the petitioner still requires \$18,924.94.
- In 2011, the petitioner still requires \$19,875.89.

Therefore, in 2004, 2005, 2006, 2007, and 2011 the sole proprietor has not demonstrated sufficient adjusted gross income both to support his household and to pay the beneficiary the proffered wage.

In 2008 and 2010, the sole proprietor has not demonstrated sufficient adjusted gross income to support his household and pay the difference between wages already paid and the full proffered wage.

On appeal, counsel asserts that the sole proprietor has sufficient cash on hand, in personal bank and checking accounts as well as in certificates of deposit and life insurance policies, to pay the beneficiary the proffered wage.

As evidence of the availability of such funds, the petitioner provided account statements for 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011. However, some of the statements represent funds which are held in business checking accounts (accounts ending in 156 and 957).

The funds in the [redacted] accounts, ending in 156 and 957, are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record of proceeding contains monthly statements from the sole proprietor's personal checking accounts (ending in 967, 475, and 393); quarterly statements from the sole proprietor's personal bank accounts (ending in 183 and 444); and monthly statements from the sole proprietor's certificate of deposit account (ending in 991) for 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011. Some of the accounts exist for only one year, while others continue over a multi-year period. The average annual balances of the accounts, when combined for the respective years, are: \$74,704.02 for 2004; \$119,840.12 for 2005; \$23,871.66 for 2006; \$21,374.10 for 2007; \$10,044.00 for 2008; \$3,103.86 for 2009; \$6,617.09 for 2010; and \$49,179.87 for 2011.

As in the instant case, where the petitioner has not established its ability to pay the proffered wage or the difference between wages already paid and the full proffered wage in the priority date year or in any subsequent year based on its adjusted gross income, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage, as in this case.⁴ Subsequent statements must show annual average balances which increase each year

⁴ In the instant case, however, not only was the petitioner unable to demonstrate the ability to pay the beneficiary in each year from 2004 through 2011, with the exception of 2009, but also the petitioner failed to demonstrate sufficient adjusted gross income from 2004 through 2010 even to cover its recurring, monthly, household expenses such that in each year the sole proprietor had a deficit when the expenses were deducted from adjusted gross income. Therefore, in considering the funds in the petitioner's personal accounts, the petitioner must demonstrate the ability to pay the required wages to the beneficiary and cover the deficit, which resulted after deducting expenses from adjusted gross income for each year.

after the priority date year by an amount exceeding the full proffered wage or the difference between wages already paid and the full proffered wage, as applicable.

In 2006, the petitioner needed to produce \$44,812.59 to cover the proffered wage and the resulting personal deficit. In that year, the petitioner's bank and checking account statements revealed a balance of \$23,871.66, which represents a \$95,968.46 decrease from the preceding year. As has been explained, the petitioner must demonstrate an increase in each subsequent year sufficient to cover the proffered wage and the personal deficit. In this case, since the petitioner's bank and checking account balance decreased by \$95,968.46 from 2005 to 2006, the sole proprietor has not demonstrated sufficient funds to cover the proffered wage or personal deficit for 2006. In 2007, the petitioner needed to produce \$39,417.24 to cover the proffered wage and the personal expenses deficit. In that year, the sole proprietor's certificate of deposit and checking account statements revealed an annual average balance of \$21,374.10, which is not sufficient to cover the required expenses. In 2008, the petitioner needed to produce \$12,007.52 to cover the difference between wages already paid and the personal expenses deficit. In that year, the sole proprietor's checking and savings account statements revealed an annual average balance of \$10,044.00, which is not sufficient to cover the required expenses. In 2010, the petitioner needed to produce \$18,924.94 to cover the difference between wages already paid and the personal expenses deficit. In that year, the sole proprietor's savings and checking account statements revealed an average annual balance of \$6,617.09, which is insufficient to cover the required expenses.

The petitioner provided a single month's statement for a certificate of deposit, which the petitioner held in December of 2007 (account ending in 784), and another certificate of deposit, which the petitioner held in November of 2007 (account ending in 933). However, the funds in these accounts appeared for only one month. They do not represent sustained funds which the petitioner held over the course of a full year. Further, after the certificates of deposit matured, the petitioner provided no evidence demonstrating the disposition of the funds, whether they were deposited into another account, or used. Therefore, the certificates of deposit statements do not demonstrate funds which were available during the course of a year to pay the beneficiary.

On appeal, the petitioner provided an account statement for a life insurance policy held in the name of the petitioner (account ending in 5PR) and a second account statement for a life insurance policy held in the name of the sole proprietor's wife (account ending in 16A). Each policy was issued in 1994 and has a cash surrender value: 1) 5PR's surrender value was \$10,385.00 as of March 14, 2009 and 2) 16A's surrender value was \$13,942.00 as of February 3, 2010.⁵

However, neither the sole proprietor nor his wife provided statements indicating that it was their intention to redeem the life insurance policies for their cash surrender value and to use such funds to pay the beneficiary. Further, even if it were the sole proprietor's intention to redeem such policies, the \$24,327.00 combined cash surrender value would not be sufficient to cover the full proffered wage, the difference between wages already paid and the full proffered wage, or the deficit resulting from the deduction of the sole proprietor's expenses from his adjusted gross income for the relevant

⁵ These are the balances indicated on the most recent statements for each policy.

years. Moreover, the policy ending in 5PR is a \$250,000.00 life insurance policy, and the policy ending in 16A is a \$300,000.00 life insurance policy. It is unlikely that a sole proprietor would sell such significant personal assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The same rationale would apply to the property deed, which the petitioner earlier provided as evidence of personal assets. Real estate is not a readily liquidable asset and would likely not be used to pay the beneficiary's wage.

Thus, the sole proprietor's cash assets, as reflected in his savings, checking, and certificate of deposit accounts do not demonstrate the continuing ability to pay the proffered wage.

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 \$100,000.00. 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, between 2004 and 2011, the petitioner paid the beneficiary wages in only three years, and the wages paid did not meet the proffered wage in 2008 and 2010. The petitioner has not established the historical growth of his business operation, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within the industry, or whether the beneficiary is replacing a former employee or an outsourced service. In addition, the petitioner provided business checking account statements for each year in an effort to demonstrate available cash on hand. However, based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or

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loss) is carried forward to the first page of the sole proprietor's IRS Form 1040 and is included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The 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.