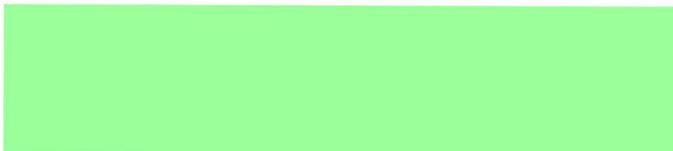


(b)(6)

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

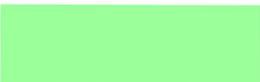


DATE:

**JAN 24 2013**

OFFICE: NEBRASKA SERVICE CENTER

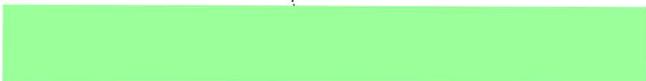
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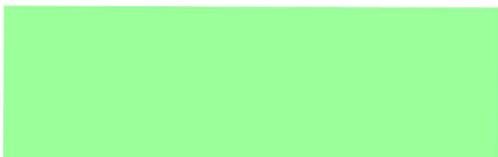
Petitioner:

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 (the director). The petitioner filed a motion to reopen the director's decision. The director granted the motion, but reaffirmed his decision to deny the petition. The petitioner filed a second motion to reopen the director's decision. The director granted the second motion, but again reaffirmed his decision to deny the petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company specializing in marble and stone tile fabrication. It seeks to employ the beneficiary permanently in the United States as a tile and marble setter. 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 April 10, 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.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour (\$35,360.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires three years of experience in the job offered of tile and marble setter.

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

On appeal, counsel submits a brief and copies of the petitioner's U.S. Income Tax Returns for an S Corporation (Form 1120S) for 2003, 2004, 2005, and 2006.

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 1979<sup>2</sup> and currently to employ 15 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 20, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in neglecting to consider the totality of the petitioner's financial circumstances, including such items as unexpected financial expenses incurred by the petitioner in 2003; the petitioner's depreciation deduction, which was taken between 2003 and 2006; the fact that the petitioner's income increased after the depreciation was completed; that the petitioner had made a loan to its shareholder; and that the petitioner has been successfully paying its employees between the years 2003 and 2006. On appeal, counsel also asserts that, since the petitioner is an S Corporation, the director should have considered the "shareholder's personal financial capacity."

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

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

<sup>2</sup> Public records maintained on the California Secretary of State's website indicate that the petitioner was established in 1997. This date is also listed on the petitioner's federal income tax returns in the upper right corner under the "Date of Incorporation" field.

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 a copy of the Form W-2, which it issued to the beneficiary in 2008, as well as pay statements, which the petitioner issued to the beneficiary in 2008 and 2009. The beneficiary's Internal Revenue Service (IRS) Wage and Tax Statement for 2008 and pay statements for 2009 show compensation received as indicated in the table below.

- For 2008, Form W-2 shows compensation of \$28,000.00.
- For 2009, the pay statements show compensation of \$4,200.00.<sup>3</sup>

The petitioner has not established that it employed and paid the beneficiary during the period from the priority date in 2001 through 2007. The petitioner, however, provided evidence which shows that it paid the beneficiary a portion of the proffered wage in 2008 and 2009. Therefore, while the petitioner must still demonstrate the ability to pay the beneficiary the full proffered wage for each year from 2001 through 2007, it must only demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage for 2008 and 2009, that difference being \$7,360.00 and \$31,160.00 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 (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.

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<sup>3</sup> The figure above reflects the beneficiary's total earnings as of February 16, 2009.

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 August 17, 2009 with the receipt by the director of the petitioner's second motion to reopen, a motion which the director granted. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 should have been the most recent return available. The petitioner's tax returns demonstrate its net income for each year from 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>4</sup> of \$67,225.00.

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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-

- In 2002, the Form 1120S stated net income of \$64,602.00.
- In 2003, the Form 1120S stated a net loss of \$56,569.00.
- In 2004, the Form 1120S stated a net loss of \$88,703.00.
- In 2005, the Form 1120S stated a net loss of \$56,975.00.
- In 2006, the Form 1120S stated a net loss of \$64,143.00.
- In 2007, the Form 1120S stated net income of \$252,633.00.
- For 2008, the petitioner did not submit regulatory-prescribed evidence of its ability to pay.

Therefore, for the years 2003, 2004, 2005, 2006, and 2008, the petitioner did not demonstrate that it had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> 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 2003, 2004, 2005, and 2006, as shown in the table below.

- In 2003, the Form 1120S, Schedule L stated net current liabilities of \$107,552.00.
- In 2004, the Form 1120S, Schedule L stated net current liabilities of \$201,842.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$214,861.00.
- In 2006, the Form 1120S, Schedule L stated net current liabilities of \$162,542.00.
- For 2008, the petitioner did not submit regulatory-prescribed evidence of its ability to pay.

Therefore, for the years 2003, 2004, 2005, 2006, and 2008, the petitioner did not demonstrate that it had sufficient net current assets to pay the proffered wage.

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

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2003), line 17e (2004-2005), and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 10, 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 no additional income, credits, deductions, or other adjustments shown on its Schedule K for any of the years from 2001 through 2007, the petitioner's net income is found on line 21 on the first page of the petitioner's tax returns.

<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in neglecting to consider the totality of the petitioner's financial circumstances, circumstances which include a number of factors. First, counsel asserts that the director should have considered the fact that, as an S Corporation, the petitioner is able to redirect its profits to its shareholders to minimize its tax liability. For that reason, counsel asserts that the director should have considered "the shareholder's personal financial capacity" in his determination of the petitioner's ability to pay.

While making this statement, counsel does not explain what is meant by the "shareholder's personal financial capacity," whether he is referring to officer compensation or to the shareholder's personal assets.

Nevertheless, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the AAO will not consider the shareholder's personal assets in a determination of the petitioner's ability to pay.

With regard to shareholder's compensation, 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. Income Tax Return for an S Corporation. 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.

According to the petitioner's tax returns, [REDACTED] owns 100 percent of the petitioning entity. However, according to the petitioner's tax returns, [REDACTED] elected to compensate himself in only one year: 2005. In that year, [REDACTED] received \$60,000.00 in officer compensation. However, the petitioner provided no evidence demonstrating that [REDACTED] is either willing or able to forgo any portion of his officer compensation for that year.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel asserts that the petitioner incurred "unusual expenses in the years of filing that appear to have temporarily worsened its financial situation." By "unusual expenses," counsel explains that, in 2003, Congress passed the Jobs and Growth Tax Relief Reconciliation Act of 2003 and that one of the provisions of this act was an increase in the amount of deductions which a company could claim

for depreciation. Counsel asserts that, due to the provisions of the Act, the petitioner availed itself of such benefits and increased its depreciation deductions for 2003, 2004, 2005, and 2006. Counsel asserts that the amounts which the petitioner deducted for depreciation for each of the years from 2003 through 2006 should be added to the petitioner's net income.

First, it should be noted that a law which decreased tax liability and enabled companies to take additional deductions for such items as depreciation cannot be claimed as an unusual expense. Rather, such an act would constitute a benefit to the business as the business would be liable for a lesser amount of tax liability than in previous years. Further, the fact that the petitioner chose to avail itself of the provisions of the act and voluntarily deduct larger amounts in depreciation was not an unforeseen expense. Rather, such an action was a voluntary business and accounting decision which the petitioner chose to claim for the purposes of improving its financial situation.

On appeal, counsel asserts that the items which were listed as depreciated on the petitioner's federal income tax return were fully depreciated as of 2006 and that the petitioner's income significantly improved subsequent to the full depreciation. However, the petitioner has not provided any subsequent tax returns to demonstrate a continued upward trend or that 2007 is not anomalous.

On appeal, counsel asserts that the petitioner made a loan to its shareholder in 2003 and that this loan is indicative of the fact that the petitioner had more money available to pay the proffered wage than was evident on the tax returns. However, the petitioner claimed the loan to its shareholder as a long-term asset on its balance sheet (Schedule L) and not as a current asset. Further, the petitioner did not provide a contract or other form of documentation setting forth the terms of the loan, including a schedule for repayment and a description of the penalties for failure to repay, each of these items constituting requirements for loans to shareholders under the guidelines recommended by the IRS.<sup>6</sup> Therefore, the petitioner has not demonstrated that the funds loaned to the shareholder would be available to pay the proffered wage.

On appeal, counsel asserts that, during the years in which the director found that the petitioner had not demonstrated the ability to pay, the petitioner continued to pay its current employees. Counsel claims that this fact is indicative of the petitioner's fiscal health and ability to pay the proffered wage.

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

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<sup>6</sup> <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Paying-Yourself#6> (accessed October 10, 2012)

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).

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 \$100,000.00. 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, the petitioner provided financial documentation for seven years of business operations. In *Sonogawa*, the petitioner demonstrated 11 years of profitability prior to the single year in which a shortfall was realized and that the shortfall was due to a specific unforeseen economic situation. Here, the petitioner did not have sufficient net income or net current assets to pay the proffered wage in 2003 through 2006 or to pay the difference between wages paid and the proffered wage in 2008. The petitioner has not demonstrated the number of years it has been doing business and has not established the historical growth of its business operations. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Further, the petitioner has not demonstrated the availability of officer compensation for purposes of paying 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.

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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.