

(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:

OFFICE: NEBRASKA SERVICE CENTER

FILE

JAN 29 2013

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 Martino
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 medical group. It seeks to employ the beneficiary permanently in the United States as a documentation supervisor. 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 August 14, 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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 October 9, 2001. The proffered wage as stated on the Form ETA 750 is \$54,400.00 per year. The Form ETA 750 states that the position requires a bachelor's degree in computer [sic] in addition to two years of experience in the job offered of documentation supervisor or in the related occupation of computer [sic].

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, counsel submits a letter, dated September 10, 2009, from the petitioner; copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2007 and 2008; a copy of the petitioner's billing report for 2008; a copy of a letter, dated April 20, 2009, from the petitioner to counsel itemizing certain expenses related to the petitioner's costs for billing; a copy of a letter dated January 10, 2009, from SAGE with an associated billing statement;² 16 pages of dates with unidentified and unexplained figures; copies of bank statements, which are not printed on bank letterhead; and copies of the petitioner's [redacted] bank statements from 2007 and 2008.

The evidence in the record of proceeding shows that the petitioner is structured as a personal services corporation. On the petition, the petitioner left blank the fields in which to identify the date upon which its business had been established, its current number of employees, and its net annual income. 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 October 3, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner³ asserts that it will soon be starting an electronic medical records system and will need help with the electronic billing system. The petitioner asserts that the use of the beneficiary's services for electronic billing will save the company \$150,000.00 annually. On appeal, the petitioner also asserts that its tax returns evidence a low net income, because, as a personal services corporation, the petitioner distributes its income to its partners, thereby reducing the company's tax liability. On appeal, the petitioner asserts that USCIS should consider the totality of the petitioner's financial circumstances.

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 According to its website, <http://na.sage.com/sage-na/company>, SAGE is a supplier of accounting and business management software to start-up small and mid-sized businesses.

³ Counsel filed the appeal. However, the petitioner, in its letter, explains the bases for the appeal.

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 addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker, using the same priority date, reflected on a Form ETA 750.⁴ Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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 neither claims to have employed the beneficiary nor has provided evidence of ever having paid the beneficiary any wages.

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.

⁴ [REDACTED] was filed on September 30, 2003 and approved on December 23, 2004. The priority date conferred by the approval of the employment-based immigrant visa petition is October 9, 2001. The beneficiary of the immigrant visa petition obtained permanent residence on January 12, 2005.

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 operating as a personal services 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 April 31, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2009 federal income tax return was not yet due. On appeal, the petitioner submitted its income tax return for 2008. The petitioner's tax returns demonstrate its net income for each year from 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$6,168.00.
- In 2002, the Form 1120 stated net income of \$23,878.00.
- In 2003, the Form 1120 stated net income of \$55,414.00.
- In 2004, the Form 1120 stated net income of \$105.00.
- In 2005, the Form 1120 stated net income of \$18,034.00.
- In 2006, the Form 1120 stated net income of \$3,043.00.
- In 2007, the Form 1120 stated net income of \$39,412.00.
- In 2008, the Form 1120 stated net income of \$54,672.00.

As explained above, the petitioner filed one other Form I-140 during the period relevant to the instant petition.⁵ The priority date of the other petition is October 9, 2001, and the beneficiary of the other petition obtained permanent residence on January 7, 2005. Without evidence to the contrary, the AAO will assume that the wage offered to the beneficiary of the other I-140 petition is the same as the proffered wage in the instant circumstance. Therefore, the petitioner must demonstrate the ability to pay the proffered wage to the beneficiaries of the two I-140 petitions for each year from 2001 through 2005. From 2006 onwards, the petitioner must demonstrate the ability to pay the beneficiary of the instant petition.

Therefore, based upon the petitioner's tax returns, for the years 2001, 2002, 2003, 2004, and 2005, the petitioner did not have sufficient net income to pay the proffered wage to the beneficiaries of the two I-140 petitions. For 2006 and 2007 the petitioner did not have sufficient net income to pay the proffered wage to the beneficiary of the instant petition.

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.⁶ 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 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 2001, 2002, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2001, the Form 1120, Schedule L stated net current liabilities of \$51,812.00.
- In 2002, the Form 1120, Schedule L stated net current liabilities of \$43,448.00.

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⁶According 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.

- In 2003, the Form 1120, Schedule L stated net current assets of \$2,680.00.
- In 2004, the Form 1120, Schedule L stated net current liabilities of \$850.00.
- In 2005, the Form 1120, Schedule L stated net current assets of \$594.00.
- In 2006, the Form 1120, Schedule L stated net current liabilities of \$17,831.00.
- In 2007, the Form 1120, Schedule L stated net current assets of \$62.00.

Therefore, for the years 2001, 2002, 2003, 2004, and 2005 the petitioner did not have sufficient net current assets to pay the proffered wage to the beneficiaries of the two I-140 petitions. In 2006 and 2007 the petitioner did not have sufficient net current assets to pay the proffered wage to the beneficiary of the instant petition.

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, the petitioner asserts that it will soon be starting an electronic medical records system and will need help with the electronic billing system. The petitioner asserts that the use of the beneficiary's services for electronic billing will save the company \$150,000.00 annually. That is, the petitioner asserts that it plans to replace the use of the outside billing service with the services of the beneficiary.

However, it is useful to discuss the nature of the proffered position as it was described on Form ETA 750 as well as how the position has been addressed by the petitioner since the filing of Form ETA 750.

The petitioner filed Form ETA 750 with the DOL on October 9, 2001. In Section 13 of Form ETA 750, the petitioner included the following lengthy description of the proffered position:

The Documentation Supervisor will work with QA documentation system. This includes implementing and maintaining databases for tracking controlled documents, archiving document histories, maintaining training documentation and ensuring that QA documentation comply with our requirements. The essential functions include the following: develop and implement standard operating procedures required to maintain our documentation including master documents, completed batch records, raw materials records, training files and technical reports. He/she will design and implement databases and other tools to track QA documentation; maintain tracking system for in-process documentation; determine appropriate reviewers and circulate documents; establish standard formats for documentation; maintain hard copy and electronic document files such that required documentation is readily available at all times; audit files as needed to ensure accuracy; provide training and assistance to other departments regarding documentation systems and practices; create and distribute reports for document status, document change histories, training, etc.

Thus, according to the description of the proffered position, the beneficiary would be working on a system which already existed, that system being a QA documentation system. Further, the primary subject matter with which the beneficiary would be working is records/files. In its response to the director's RFE, the petitioner states that it has been using the services of an outside billing service for at least 20 years. However, the description of the proffered position submitted to the DOL contains no indication that the position involves any aspect of billing. Given the thoroughness of the position description, had the petitioner intended the proffered position to encompass billing in addition to all of the other ascribed duties, it could have included that duty in the position description, yet it did not.

The instant petition is the third petition which the petitioner has filed on behalf of the beneficiary. The first petition, [REDACTED] was filed on February 25, 2004. The petitioner made no mention of the proffered position involving the performing of billing services either in its initial petition submission or in its response to the director's RFE, which was issued on July 3, 2004. The second petition, [REDACTED] was filed on January 19, 2006. The petitioner claimed that the beneficiary would be replacing outsourced services for billing, undefined outside services, payroll, printing, and storage. The director found that the description of the proffered position did not include such duties and, further, that the petitioner had not sufficiently described how the beneficiary would perform such duties. In the instant case, the petitioner has not mentioned any of the other outside functions, but relegates the replacement of outside service simply to medical billing, that is, in addition to the duties identified on Form ETA 750 in Section 13.

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).

Based upon the evidence in the record and the position description, it does not appear to have been the petitioner's original intent to utilize the services of the beneficiary to perform its medical billing in addition to the maintenance and quality assurance of all of its records. Further, the position duties as detailed in Section 13 of Form ETA 750, as certified by the DOL, is clear in involving medical records, their maintenance, and quality assurance. There is no mention of medical billing and no duties which would closely resemble medical billing. Therefore, the petitioner has not demonstrated that the beneficiary would be replacing the outside billing service which the petitioner has utilized for more than 20 years.

On appeal, the petitioner also asserts that its tax returns evidence a low net income because, as a personal services corporation, the petitioner distributes its income to the partners thereby reducing the company's tax liability.

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.

The documentation presented here indicates that [REDACTED] holds 50 percent of the company's stock and performs personal services of the practice. Additionally, [REDACTED] holds 50 percent of the company's stock and performs personal services of the practice. According to the petitioner's IRS Forms 1120 Schedule E (Compensation of Officers) [REDACTED] and [REDACTED] elected to pay themselves each \$84,000.00 in 2001; \$96,345.00 and \$89,000.00 in 2002 respectively; \$84,000.00 in 2003; \$91,000.00 in 2004; \$91,000.00 in 2005; \$91,000.00 in 2006; \$119,600.00 in 2007; and \$113,461.00 and \$108,000.00 in 2008 respectively. The AAO notes that the compensation received by the company's equal owners during these years was not a fixed salary. In the present case, USCIS would not be examining the personal assets of [REDACTED] or [REDACTED] but, rather, the financial flexibility that either as the equal owners has in setting his salary based on the profitability of his personal service corporation medical practice. First, there is no evidence demonstrating that either [REDACTED] or [REDACTED] would be willing or able to forego any portion of their officer's compensation in order to pay the proffered wage. Although [REDACTED] mentions the fact that the personal services corporation distributes its earnings to the shareholder for purposes of minimizing its tax liability, he has not stated that he intends to forego any of his officer compensation to pay the beneficiary. Additionally, the petitioner provided no documentation from [REDACTED] indicating that he intends to forego any of his officer compensation to pay the beneficiary.

In this case, the appeal was filed by [REDACTED]. Even if he intended to forego some of his officer compensation, the wages owed to the beneficiary would constitute a major portion of his officer's compensation for each year. For example, if the AAO takes into consideration the petitioner's net income as available to pay the beneficiary, the remaining sum in 2001 would be \$48,232.00, which

is 57 percent of [REDACTED] officer compensation for that year. In 2004, taking into account the petitioner's net income, the remaining sum due to the beneficiary would be \$54,295.00 or 60 percent of [REDACTED] officer compensation for that year. In 2006, taking into consideration the available net income, the petitioner would still owe the beneficiary \$51,357.00 or 56 percent of [REDACTED] officer compensation for that year. There is no evidence demonstrating that [REDACTED] would be able to forgo the majority of his officer compensation to pay the beneficiary. Further, for each year from 2001 through 2005, the petitioner must demonstrate the ability to pay two beneficiaries. For those years, the wages owed to the two beneficiaries exceeds the officer compensation for [REDACTED]. Thus, even if [REDACTED] were to forgo all of his compensation, these funds would not be sufficient to pay the two beneficiaries.

The petitioner did not possess sufficient net income or net current assets to pay the proffered wage to the two beneficiaries from 2001 through 2005 or to the beneficiary of the instant petition in 2006 and 2007. The petitioner has not demonstrated the historical growth of its business, the overall number of employees, 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. Thus, assessing those factors relevant to the operation of a personal services corporation and 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.