



U.S. Citizenship
and Immigration
Services

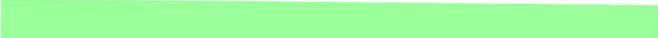
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Date: JUN 24 2013

Office: NEBRASKA SERVICE CENTER File: 

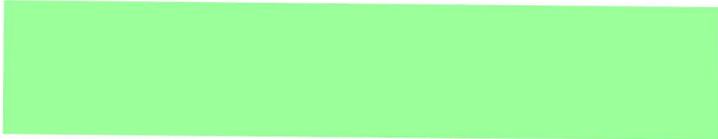
In re:

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 Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sheep ranch. It seeks to employ the beneficiary permanently in the United States as a lead shepherd pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by 20 C.F.R. § 656.16, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, filed directly with Department of Homeland Security (DHS). The director denied the petition, finding that the petition was not accompanied by the required prevailing wage determination, and that the position was ineligible for classification as a professional or skilled worker.

As set forth in the director's decision dated July 14, 2009, an issue in this case is whether the petition was accompanied by the required prevailing wage determination.

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

The 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.

The petitioner has applied for a labor certification for the beneficiary to work as a shepherd. The regulation at 20 C.F.R. § 656.10(a)(4) provides that an employer seeking labor certification for a shepherd must apply for a labor certification under this section and must also choose to file the labor certification application with DHS pursuant to 20 C.F.R. § 656.16, or with an office of the United States Department of Labor (DOL) pursuant to § 656.17. The petitioner in this case chose to file the labor certification application directly with DHS rather than with an office of the DOL, and thus must comply with the requirements of 20 C.F.R. § 656.16.

The regulation at 20 C.F.R. § 656.16 provides, in part:

(a) Filing requirements and required documentation.

(1) An employer may apply for a labor certification to employ an alien (who has been employed legally as a nonimmigrant shepherd in the United States for at least 33 of the preceding 36 months) as a shepherd by filing an

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).

Application for Permanent Employment Certification form directly with DHS, not with an office of DOL.

(2) A signed letter or letters from each U.S. employer who has employed the alien as a shepherd during the immediately preceding 36 months, attesting the alien has been employed in the United States lawfully and continuously as a shepherd for at least 33 of the immediately preceding 36 months, must be filed with the application.

(b) Determination. An Immigration Officer reviews the application and the letters attesting to the alien's previous employment as a shepherd in the United States, and determines whether or not the alien and the employer(s) have met the requirements of this section.

....

(c) Alternative filing. If an application for a shepherd does not meet the requirements of this section, the application may be filed under § 656.17.²

The regulation at 20 C.F.R. § 656.10(c)(1) states, in pertinent part:

The offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and § 656.41. ..

The regulation at 20 C.F.R. § 656.40 states, in pertinent part:

(a) Application process. The employer must request a determination from the [State Workforce Agency (SWA)] having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.

(c) Validity Period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by Sec. 656.17(d) or 656.21 within the validity period specified by the SWA.

In this case, the petition was not accompanied by the required prevailing wage determination. In a Request for Evidence (RFE) dated March 11, 2009, the director requested that the petitioner submit a prevailing wage determination that was valid at the time of filing the labor certification. In its

² The regulation at 20 C.F.R. § 656.17 requires that the application for labor certification be filed with an office of the DOL. Pursuant to 20 C.F.R. § 656.17(b), applications for labor certification are certified, denied, or screened for audit by an office of the DOL.

response to the director's RFE, the petitioner stated that "the application of Section 656.40 to the present case is confusing, in that it refers to any employer filing an Application for Permanent Employment Certification 'either electronically or by mail with an ETA application processing center' which is inapplicable to applications filed on behalf of shepherders."

On appeal, the petitioner, through counsel, states that the petitioner did not request a prevailing wage determination from the State Workforce Agency (SWA) because it did not think that the regulation at 20 C.F.R. § 656.40 applied to shepherd cases. Additionally, counsel contends that the Department of Labor posts its prevailing wage determination regarding shepherders on the Agricultural Wage Library, and therefore, the wage is widely known. For those reasons, according to counsel, "it would be unfair for the Service to deny the petition on this basis."

The regulations governing shepherd's are clear. The petitioner was required to request a prevailing wage determination from the SWA pursuant to 20 C.F.R. § 656.10(a)(4), § 656.10(c)(1), and § 656.40. It failed to do so. For that reason, the petition must be denied.

As set forth in the director's decision dated July 14, 2009, another issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on July 31, 2007.³ On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The regulations at 8 C.F.R. § 204.5(l)(3)(i) state that every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies

³ The AAO notes that the petitioner filed a Form ETA 750, Application for Alien Employment Certification with the petition. In a Request for Evidence (RFE) dated March 11, 2009, the director requested that the petitioner submit an uncertified ETA Form 9089, Application for Permanent Employment Certification (PERM). The AAO notes that the effective date of PERM is March 28, 2005, and therefore, all references to the labor certification will be to the Form 9089. See http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed April 4, 2013).

for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

On the labor certification, the petitioner indicates that the position of lead shepherd requires 36 months experience in the job offered of lead shepherd or in the related occupations of shepherd or shepherd/camptender. As the petitioner requires at least two years experience to qualify for the offered position, the AAO finds that the position of lead shepherd qualifies for skilled worker classification.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Therefore, a petition for a skilled worker must establish that the occupation of the offered position requires at least two years training or experience as a minimum for entry; the job offer portion of the labor certification requires at least two years experience; and the beneficiary meets all of the requirements of the labor certification.

In this case, the job offer portion of the labor certification requires 36 months experience in the job offered or in the related occupation of shepherd or shepherd/camptender. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a shepherd from March 1998 until March 2000, and as a shepherd/camptender from April 2000 until April 2003.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter dated July 31, 2007 from [REDACTED] Company letterhead. The letter states that the beneficiary has been working as a lead shepherd in H-2A status for 35 of the last 36 months. The letter, however, was submitted for the purpose of meeting the requirements of 20 C.F.R. § 656.16(a)(1) and (2) which requires the petitioner to establish that the beneficiary has been employed legally as a nonimmigrant shepherd for at least 33 of the preceding 36 months.⁴ The letter does not

⁴ The regulation at 20 C.F.R. § 656.16 provides, in part:

(a) Filing requirements and required documentation.

comply with the requirement at 8 C.F.R. § 204.5(l)(3)(ii)(A) which requires that the beneficiary's claimed qualifying experience be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. Additionally, the letter refers to the position of lead shepherd, and not the alternate occupation of shepherd and shepherd/campender on which the beneficiary claims he qualifies.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, indicate that the beneficiary qualifies for the offered position based on experience in the alternate occupation of shepherd or shepherd/campender.

20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation.

.....
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(1) An employer may apply for a labor certification to employ an alien (who has been employed legally as a nonimmigrant shepherd in the United States for at least 33 of the preceding 36 months) as a shepherd by filing an Application for Permanent Employment Certification form directly with DHS, not with an office of DOL.

(2) A signed letter or letters from each U.S. employer who has employed the alien as a shepherd during the immediately preceding 36 months, attesting the alien has been employed in the United States lawfully and continuously as a shepherd for at least 33 of the immediately preceding 36 months, must be filed with the application.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
- (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

- (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

The beneficiary's experience letter is based on experience with the petitioner. In response to question J. 18, the petitioner indicates that the beneficiary does not have the experience as required in question H.10 (requiring 36 months in the job offered), but in response to question J.20, the petitioner indicates that the beneficiary has the experience in the alternate occupation. In question J.21, which asks if the beneficiary gained any of the qualifying experience with the employer in a position substantially comparable to the job opportunity, the petitioner left the answer blank.

In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially

comparable⁵ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a shepherd and as a shepherd/camp tender. However, there is no evidence in the record indicating whether the alternate occupation of shepherd or shepherd/camp tender is not substantially comparable, i.e. that the beneficiary was not performing the same job duties more than 50 percent of the time, to the offered position. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Therefore, the experience may not be used to qualify the beneficiary for the proffered position.

The record also contains inconsistencies regarding the beneficiary's experience. On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary indicates that he began working in the position of lead shepherd in June 2003. However, in the letter from [REDACTED] dated July 31, 2007, he indicates that the beneficiary began working as a lead shepherd on July 31, 2004, more than one year after the beneficiary's claimed start date. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.*

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director,⁶ the petitioner failed to comply with the notice of filing requirements, as provided at 20 C.F.R. § 656.10(d).

⁵ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d)(1) provides:

In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

Further, the regulation at 20 C.F.R. § 656.10(d)(3)(iv) states:

The notice of the filing of an Application for Permanent Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and

- (iv) Be provided between 30 and 180 days before filing the application [the petition].

In the RFE dated March 11, 2009, the director requested evidence that the notice was posted in accordance with the regulations. In response to the RFE, counsel stated that the petitioner is exempt from the posting requirement because the petitioner is a private household and did not employ any U.S. workers at the time of filing the labor certification. *See* 20 C.F.R. § 656.10 (d)(2). Counsel asserts that the ranch “consists of Mr. [REDACTED] private home and outbuildings.” Therefore, according to counsel, the petitioner qualifies as a private household.

The record, however, does not contain any evidence that the petitioner is a private household. The regulation at 20 C.F.R. § 656.3 states in pertinent part:

Employer means:

- (1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN).

In this case, the petitioner, as stated on the labor certification and on the petition, is “[REDACTED],” a sheep ranch that has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States. On the petition, the petitioner claims to employ four workers. Additionally, [REDACTED] possesses an Employer Identification Number (EIN) issued by the IRS which indicates that it is not a private household for purposes of 20 C.F.R. § 656.10 (d)(2). Therefore, the petitioner is not exempt from the posting notice requirement pursuant to 20 C.F.R. § 656.10(d)(3)(iv).

Also, beyond the decision of the director, the AAO notes that the petitioner has not demonstrated that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Consistent with the regulation cited above, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is "the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).⁷

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. The record contains Forms W-2 issued to the beneficiary by the petitioner for the years 2004, 2005, and 2006. The wages paid to the beneficiary in 2004, 2005, and 2006 are not dispositive of the petitioner's ability to pay the proffered wage since the petitioner is not obligated to demonstrate the ability to pay prior to the priority date of July 31, 2007.⁸

When the petitioner does not establish that it employed or 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). 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, as noted above, 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. 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. Since the business in this case is a farm, the farm-related income and expenses are reported on Schedule F,

⁷ See also, 20 C.F.R. § 656.30(a)(1), which provides that the filing date, or priority date for Schedule A occupations and shepherders is the date the application is dated [received] by USCIS.

⁸ The AAO notes that the beneficiary's wages for 2004, 2005, and 2006, are less than the offered wage of \$1,500 per month (\$18,000 per year) as stated on the labor certification.

Profit or Loss from Farming, and are carried forward to the first page of the tax return. See <http://www.irs.gov/publications/p225/ch03.html> (last accessed August 4, 2011). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their adjusted gross income (AGI) or other available funds. 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 petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The record contains the petitioner's Form 1040 U.S. Individual Tax Return with Schedule F for 2006. The record does not contain any evidence of the petitioner's ability to pay the proffered wage from the priority date in 2007. This issue must be addressed with any further filings.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.