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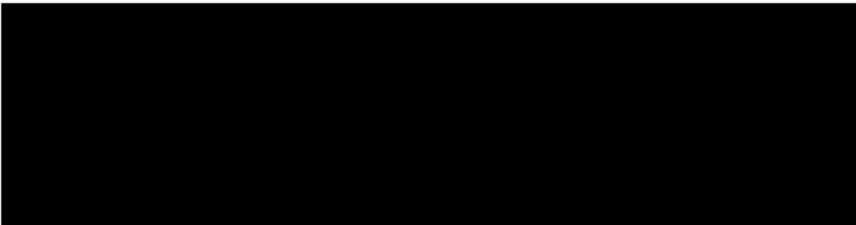
FILE: EAC 06 088 51720 Office: NEBRASKA SERVICE CENTER Date: **FEB 27 2006**

IN RE: Petitioner:
Beneficiary:



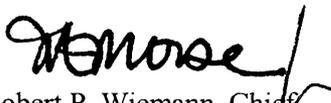
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a sheet metal shop. It seeks to employ the beneficiary permanently in the United States as a metal fabricator. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 6, 2002. The proffered wage as stated on the Form ETA 750 is \$28 per hour, which equals \$58,240 per year.

The Form I-140 petition in this matter was submitted on February 2, 2006. On the petition, the petitioner stated that it was established on January 4, 1968 and that it employs 14 workers. On the Form ETA 750, Part B, signed by the beneficiary on May 17, 2002, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Irvington, New Jersey.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*,

NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹ In the instant case the record contains (1) the petitioner's 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) 2000, 2001, 2002, 2003, and 2004 Form W-2 Wage and Tax Statements, and (3) a letter dated October 9, 2006 from the petitioner's owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation and that it reports taxes pursuant to accrual convention and the calendar year. They also confirm that the petitioner incorporated on January 4, 1968.

The petitioner's 2002 tax return shows that it declared a loss of \$7,056 as its Schedule K, Line 23 Income.² The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that it declared a loss of \$6,975 as its Schedule K, Line 23 Income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2004 tax return shows that it declared a loss of \$45,200 as its Schedule K, Line 17e Income/loss reconciliation.³ The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000, 2001, 2002, 2003 and 2004 W-2 forms provided show that during those years the petitioner paid the beneficiary wages of \$34,666.90, \$38,347.50, \$34,026.89, \$37,754.34 and \$39,740.99, respectively. This office notes that because the priority date of the instant petition is June 6, 2002, evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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

² The Schedule K Line 23 Income of a subchapter S corporation or other entity reporting on the Form 1120S, U.S. Income Tax Return for an S Corporation, is the sum of the various types of its income and gain (Ordinary income, Long-term Capital Gain, Short-term Capital Gain, *et cetera*) minus the various types of loss (Ordinary loss, Long-term Capital Loss, Short-term Capital Loss, *et cetera*) and is considered to be net income for the purpose of assessing the petitioner's ability to pay the proffered wage.

³ The Schedule K was amended such that what had been designated Line 23 Income is now called Line 17e Income/loss reconciliation. For the years after that amendment, Line 17e Income/loss reconciliation is considered net income.

This office further notes that, on the Form ETA 750B, the beneficiary indicated that he had never worked for the petitioner, whereas the W-2 forms indicate that the petitioner paid the beneficiary wages of between \$34,000 and \$40,000 from 2000 to 2004. Further still, the 2000 W-2 form indicates that the petitioner paid the beneficiary \$34,666.90 during that year, although the beneficiary claimed, on the Form ETA 750B, to have worked for [REDACTED], in Summit, New Jersey, until May of 2000.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petitioner's owner's October 9, 2006 letter states that the petitioner's accountant routinely files for an extension of time to file the petitioner's tax returns and that its 2005 tax return was not then complete. The petitioner's owner also stated that approximately \$500,000 in current liabilities shown on the petitioner's Schedules L for the salient years are amounts owed to the officers of the corporation.

The acting director denied the petition on August 4, 2006, finding that the evidence submitted did not demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel noted that no request for evidence was issued before the visa petition was denied. Counsel also cited the petitioner's gross receipts and its total wage expense as indices of its ability to pay the proffered wage.

Subsequently, counsel submitted a brief to supplement the appeal. In the brief, counsel again noted that no request for evidence was issued in this matter. Counsel asserted that the losses declared on the petitioner's tax returns are "bookkeeping losses," rather than actual losses. Counsel again cited the petitioner's gross receipts and total wage expense as evidence of its ability to pay the proffered wage.

Counsel cited non-precedent decisions of this office for the proposition that the petitioner's depreciation deductions and end-of-year cash should be added to its income for the purpose of analyzing its ability to pay the proffered wage during the various years. Counsel also cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the instant petition should be approved based on the totality of the circumstances in this case.

In the brief, counsel reiterated the petitioner's owner's assertion that the petitioner's 2006 tax return was not yet available.

This office will initially address the procedural error alluded to by counsel, that is, that no request for evidence was issued in this matter. The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [Citizenship and Immigration Services] prior

to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence

If the petitioner had neglected to submit some portion of the initial evidence, evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted its 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation with the petition. That return showed the petitioner's net profit or, in this case, loss, calculated pursuant to tax accounting convention.⁴ The acting director found that the tax returns had failed to demonstrate the ability to pay the proffered wage, rather than that the evidence was incomplete. No request for evidence was required in the instant case.

Even if a request for evidence were required, the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and did, in fact, submit additional evidence.⁵ The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence if issuance of such a request were required.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁶ or otherwise increased its net income,⁷ the petitioner is obliged to show

⁴ This office does not dispute that financial statements produced pursuant to an audit, for instance, might be better indices of the petitioner's financial strength than the tax returns it submitted. In the absence of any superior evidence, however, the petition must be reviewed on the basis of the evidence that the petitioner submitted.

⁵ The petitioner's 2003 and 2004 tax returns and the petitioner's owner's October 9, 2006 letter were not in the record prior to the appeal.

⁶ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage. This avenue is not open to the petitioner in the instant case, as, by submitting the W-2 forms in the record, the petitioner has claimed to have employed the beneficiary during each of the salient years.

⁷ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage. Again, the petitioner in the instant case is unable to demonstrate that its profits during the salient years would have been higher if it had employed the beneficiary, as the petitioner claims to have employed the beneficiary during each of those years.

the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court held that the Immigration and Naturalization Service, now CIS, 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 CIS should have considered income before expenses were paid rather than net income.

Counsel's citation of unpublished, non-precedent AAO decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of non-precedent decisions is of no precedential effect.

Counsel asserted that the losses shown on the petitioner's tax returns are mere "bookkeeping losses," and that the petitioner's depreciation deductions should be added back to its losses during each of the given years. The argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁸ Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

⁸ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L end-of-year Cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part.

On appeal, counsel asserts that the bulk of the petitioner's current liabilities are debts owed to its officers. To whom those current liabilities are due, however, is of no consequence. That they are listed as current liabilities indicates that the petitioner expects to pay those debts within the coming year, which is a sufficient reason that they should be subtracted from the petitioner's current assets in arriving at its net current assets, which calculation, along with its significance, is addressed further below.

Finally, counsel urges that the instant petition should be approved based on the totality of circumstances test enunciated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonogawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$34,666.90, \$38,347.50, \$34,026.89, \$37,754.34 and \$39,740.99 during 2000, 2001, 2002, 2003 and 2004, respectively. The amounts paid during 2000 and 2001 are not, as was noted above, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and will be disregarded. As to 2002, 2003, and 2004 the petitioner has demonstrated the ability to pay part of the proffered wage and must show the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁹ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$58,240 per year. The priority date is June 6, 2002.

⁹ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner has demonstrated that it paid the beneficiary \$34,026.89 during 2002 and must show the ability to pay the remaining \$24,213.11 balance of the proffered wage during that year. The petitioner declared a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it paid the beneficiary \$37,754.34 during 2003 and must show the ability to pay the remaining \$20,485.66 balance of the proffered wage during that year. The petitioner declared a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner has demonstrated that it paid the beneficiary \$39,740.99 during 2004 and must show the ability to pay the remaining \$18,499.01 balance of the proffered wage during that year. The petitioner declared a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on February 2, 2006. On that date the petitioner's 2005 tax return was not yet due and may have been unavailable.¹⁰ For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

¹⁰ Counsel asserted on appeal, relying on the petitioner's owner's October 9, 2006 letter, that the petitioner's 2005 tax return remained unavailable. This office notes that October 9, 2006 was after March 15, 2006, when that return was due, and also past September 15, 2006, the date to which the petitioner could automatically extend its time to file by submitting a Form 7004 Application for Extension.

The failure to provide that return is excused by the fact that it was not due when the petition was filed and it was never subsequently requested. If the failure to provide that return were not so excused, however, then the petitioner would be required to submit considerably more explanation of its absence.

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The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.