

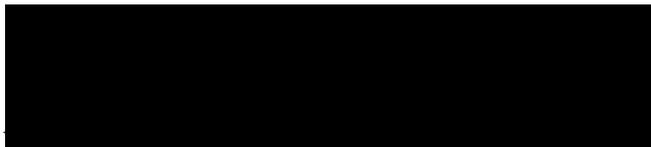
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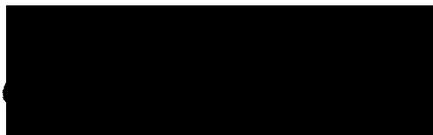
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FILE: EAC 02 266 54098 Office: VERMONT SERVICE CENTER Date: **AUG 30** 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

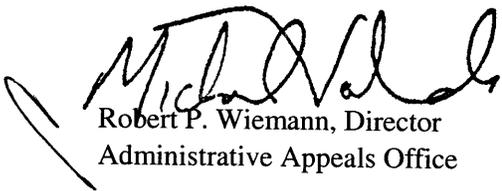
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director  
Administrative Appeals Office

**DISCUSSION:** The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant/diner. It seeks to employ the beneficiary permanently in the United States as an Italian food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 Immigration and Nationality Act (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.

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 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 Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$12.59 per hour, which amounts to \$26,187.20 annually.

On the initial petition, the petitioner did not indicate when it was established, the number of employees, or its gross or net annual income. The petitioner submitted an amended Form ETA 750 that stated the business [REDACTED] New Jersey, had changed ownership since August 2001, and was presently doing business as The [REDACTED]. The record reflects that the Department of Labor amended the original ETA Form 750 in December 2001, prior to certifying the application on June 26, 2002. The petitioner also submitted a Certificate of Incorporation that stated the business named [REDACTED] had incorporated on August 20, 2001.

Ms. [REDACTED] (Ms. [REDACTED]), Labor Certifications Specialist, West Milford, New Jersey, stated in a cover letter that the petitioner is under new ownership, and that the tax return of the “previous business at the time the labor certification was filed” are submitted.<sup>1</sup> The petitioner then submitted an IRS Form 1065 for the year 2001 from a partnership identified as [REDACTED], New Jersey. This tax return indicated that the petitioner had two partners with each having a 50 percent interest in the petitioner. The petitioner also submitted an employment verification letter from the beneficiary’s former U.S. employer.

Because the evidence submitted was insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on May 13, 2003, the director requested additional evidence pertinent to that ability. The director first requested the petitioner to submit documentary evidence that The [REDACTED] and [REDACTED] were one and the same business. Then the director requested documentary evidence of all the beneficiaries for whom the petitioner had submitted petitions, with their receipt numbers, positions hired for, and the proof of salary paid. The director specifically requested that the petitioner submit its 2002 federal income tax return with all supporting schedules to establish that it had the ability to pay the proffered wage as of the priority date. In addition the director requested that the petitioner submit all four of its 2001 and 2002 quarterly federal income tax returns.<sup>2</sup> The director also requested further documentary evidence with regard to the salaries paid to other employees, and stated that the petitioner could either submit Forms W-2 or Forms 1099-MISC if it had less than 25 employees, or Forms W-3 or 1096 if the petitioner had more than 25 employees. The director requested this employee documentation for both 2001 and 2002. Finally, the director requested that the petitioner submit its 2001 and 2002 bank statements showing monthly ending balances.

In response, the petitioner submitted another letter written by Ms. [REDACTED]. Ms. [REDACTED] stated that the petitioner with the initial petition submitted the former owner’s income tax return, and that the current owner of the petitioner did not submit an income tax return in 2001. Ms. [REDACTED] stated that the current petitioner was closed for the greater part of 2001, while the restaurant was under renovation and expansion. Ms. [REDACTED] continued that based on a conversation she learned that the former owner had personally asked one of the new owners to continue with the beneficiary’s documents and to offer him a position because of the beneficiary’s excellent work record and expertise. Ms. [REDACTED] then stated that based on the size of the petitioner’s menu, which Ms. [REDACTED] described as ten pages with many color illustrations, she knew that the restaurant/diner under new management would do very well. Ms. [REDACTED] also appeared to contrast the gross receipts of the former owner, which were \$598,741 during 2001, with the gross receipts of the petitioner at the end of 2002, which are \$942,009, and to determine that the difference in these numbers established the ability of the petitioner to pay the proffered wage.<sup>3</sup>

<sup>1</sup> Ms. [REDACTED] is not an attorney, or an accredited representative recognized by the Board of Immigration Appeals, and therefore the petitioner, until the submission of its appeal of the director’s decision, is considered to be self-represented.

<sup>2</sup> It appears that the director was referring to IRS Form 941, Employer’s Quarterly Federal Tax Return, which is submitted to the IRS quarterly.

<sup>3</sup> Ms. [REDACTED] referred to these figures as “taxes,” but neither the claimed former owner or current owner paid such taxes. The only similar figures on the former owner’s Form 1065, and the current owner’s Form 1120S are the gross receipts figures.

Finally Ms. [REDACTED] stated that the petitioner had submitted no other I-140 petitions, and that the petitioner had no Forms W-2 for the beneficiary because he lacked a social security number. The petitioner resubmitted Form 1065 for 2001 for New Halkias Brothers Partnership, and submitted IRS Form 1120S for 2002 for The [REDACTED] a.k.a. [REDACTED]. In addition the petitioner also submitted a one-page ledger document that lists journal entries and cash disbursements from January 31, 2002 to December 2002. The petitioner also submitted four IRS Forms 941, Employer's Quarterly Federal Tax Return, for the tax year 2002, as well as state of New Jersey Forms NH-47 Employer's Quarterly Report. The petitioner also submitted a Form W-3 for 2002 and 59 W-2 Forms for tax year 2002. These documents indicated that the petitioner had 39 employees, either on full time or part time basis for the tax year 2002. The documents also indicated that the petitioner paid \$310,609 in wages, tips and other compensation and filed 63 W-2 Forms.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 22, 2003, denied the petition. The director stated that the petitioner's previous owner claimed a business income of -\$90,030, including depreciation on their 2001 federal income tax return, and that the new owners claimed a business income of \$18,455, including depreciation, on its 2002 federal income tax return. The director stated the previous owners had a shortfall of \$63,842.80 after the proffered wage was subtracted from the previous owner's business income, and that the present owner's business income in 2002 was \$7,732.20 less than the proffered wage. The director also stated that the petitioner's 2002 liabilities were \$1,176,451 more than the petitioner's assets.

On appeal, counsel, newly hired by the petitioner, states that the final tax return of the previous owner was filed for tax year 2001 as a partnership, not a corporation. Counsel claims that the previous owner incurred a net loss operating the business in 2001, but also met its financial obligations. Counsel points out that although the CIS identified that loss as \$90,030, the partnership had gross receipts of \$598,741, and a gross profit of \$188,302, and that the partnership actually paid its employees \$98,507 in 2001, a figure four times the amount of the proffered wage. Counsel also states that the petitioner's cash flow in 2001 also demonstrates that it had sufficient funds on hand to pay the proffered wage. Counsel cites to *Matter of [REDACTED]* and states that this AAO decision stands for the proposition that if the employer actually paying wages at or above the proffered wage has established its ability to pay.

Counsel then states that the 2001 tax return shows that the partnership had sufficient assets to meet its wage obligations even while operating at a deficit of \$90,030, as Schedule M-2 shows that the partnership made total cash distributions to its two partners of \$425,885.<sup>4</sup> Counsel states that it is well settled law that when the employer is a partnership, its assets and the assets of the individual partners are counted as available to met wage obligations to employees, and therefore such distributions demonstrate the petitioner's ability to pay the proffered wage. Counsel notes that each of the two partners of the former petitioner received cash distributions of \$212,943 in 2001.

With regard to the petitioner's ability to pay the proffered wage in the future, counsel states that in 2002, the petitioner paid \$310,608 in wages on 63 different W-2 forms to 63 employees who worked for short periods of

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<sup>4</sup> These distributions are also reflected in Schedules K-1, Partner's Share of Income, Credits, Deductions, Etc.

time. Counsel states that the petitioner used its cash flow of \$942,009 to meet these wages, and it would do the same to pay the proffered wage of \$26,187.20. Counsel also notes that the director in his decision did not take into account the petitioner's available inventory of paid goods which was identified as \$18,355 at page 2, line seven of the 2002 tax returns. Counsel describes inventory that has been paid as liquid assets. Counsel states that the combination of the petitioner's depreciation of \$17,029, ordinary income of \$1,426, and inventory of paid goods of \$18,355 amounts to \$36,810, which is available to pay the proffered wage. Counsel also notes that the Sovereign Bank ledger submitted to the record also supports the petitioner's ability to pay the proffered wage because it shows positive balances for ten months of the year that are well in excess of the proffered wage in each of those ten months. Counsel also questions the director's determination that the petitioner's 2002 liabilities are \$1,176,451 greater than its assets. Counsel states that Schedule L of the 2002 tax return shows total assets of \$1,224,735, and also total liabilities and shareholders equity of \$1,224,735.

Counsel finally states that, based on the petitioner's high increase in volume from 2001 to 2002, the doubling of its revenues and gross profits from one year to the next, and the elimination of the prior partnership's loss in 2001, it is reasonable to expect that the petitioner will continue to generate sufficient income to pay the proffered wage. Counsel submits copies of the petitioner's monthly bank statement from Sovereign bank covering the period from February 20, 2003 to August 2003.

Upon review of the record, the director in his request for further evidence raised an issue to be considered in these proceedings. The director requested documentary evidence that the business identified on the Form 1065 submitted for 2001, namely New Halkias Brothers Partnership and the petitioner, identified on the I-140 petition as The [REDACTED] a.k.a. [REDACTED] are one and the same business. While the director did not address this issue in his decision, and, furthermore, did not address the issue precisely enough in the request for further evidence, this issue of whether the restaurant business identified as [REDACTED] is the former owner of the current petitioner's restaurant in 2001 and therefore the beneficiary's employer at the time the petition was filed, needs to be addressed to evaluate whether the current petitioner needs to establish that it is a successor in interest to the initial petitioner.

The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by the Bureau, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.<sup>5</sup> See, e.g., *Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985).

With regard to successor-in-interest, this status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. According to a Citizenship and Immigration Services (CIS) memo issued in December 1993, if the petitioner has been bought out, merged, or had a significant

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<sup>5</sup> See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

change in its ownership, the successor in interest must file a new I-140 petition.<sup>6</sup> In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). With regard to the current petition, the Department of Labor amended the Form ETA 750 prior to its certification and thereby changed the name of the petitioner on the form; however, the record is still not clear as to who was the owner of the initial petitioner, and the relationship between the initial petitioner and the current petitioner.

In the initial petition submission, the petitioner stated that the 2001 tax returns submitted to the record were those of the previous owner. This assertion is not enough to establish the ownership of the petitioner as of the priority date. The assertions of the petitioner, as well as of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). While the petitioner submitted documentation that it was incorporated in August 2001, this document only establishes that the current petitioner did not exist in corporate status at the time of the priority date of April 2001. Therefore the petitioner needs to establish who exactly was the owner of the diner/restaurant business as of the priority date.

In addition, the relationship in 2001 between the [REDACTED] and the restaurant named on the original ETA 750, namely [REDACTED] is not clearly established in the record. If the [REDACTED] partnership owned the Ruth-Lind Restaurant/Diner in 2001, and then sold it to [REDACTED] a.k.a. [REDACTED], this fact needs to be established in the record. Presently the record lacks any documentation of the sale of the restaurant/diner to a new owner in 2001. The record does establish that the [REDACTED], [REDACTED], and the [REDACTED] all have different addresses on East St. George Street in Linden, New Jersey. In addition, if the petitioner did buy the restaurant business from either [REDACTED] or the [REDACTED] in August 2001, the record contains no evidence that the petitioner qualifies as a successor-in-interest to either business. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor, or near the predecessor's business location, does not establish that the petitioner is a successor-in-interest. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Without identifying the previous owner of the restaurant/diner as of the priority date, it is not known what probative weight to give the tax information contained on the 2001 Form 1065 submitted to the record. Nevertheless the AAO will examine both the 2001 and 2002 tax returns submitted to record, for further analysis of the regulatory issues involved and also for further clarification of the director's comments in his denial of the petition.

The director in his request for further evidence requested that the petitioner submit its bank statements for 2001 and 2002, with monthly ending balances. On appeal, counsel submits monthly banking statements from Sovereign Bank for six months in 2003. The director's and counsel's reliance on the monthly balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R.

<sup>6</sup> Memorandum from [REDACTED] Acting Executive Associate Commissioner, INS Office of Operations, *Amendment of Labor Certifications in I-140 Petitions*, HQ 204.24-P. (December 10, 1993).

§ 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner in the time period in question. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, the 2002 bank ledger document for the petitioner's Sovereign Bank account also faces similar obstacles in attempting to provide probative weight as to the petitioner's ability to pay the proffered wage. For example, the ledger's ending balances for the months of January and December 2002 are -\$42,250.70 and -\$501.69 respectively, which further weaken the use of such documents to establish the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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. The beneficiary did not indicate on ETA Form 750 that he had worked for the petitioner, but rather stated that he was self-employed from March 2000 to the date the Form ETA 750, Part B was signed on March 15, 2001. Although the petitioner stated in its response to the director's request for further evidence that it had paid the beneficiary, the petitioner's employment records do not reflect his employment. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Contrary to the director's determination in his denial, this examination does not consider depreciation or other expenses. 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).

In response to the director's request for further evidence and on appeal, both the petitioner and counsel mention the petitioner's gross receipts. However, showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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 the Service, now CIS, should have considered income before expenses were paid rather than net income. As previously stated, the petitioner has not established that New Halkias Brothers Partnership was the petitioner's owner in 2001, or that it is the same business entity as the current petitioner. Therefore the Form 1065 submitted to the record is not dispositive as to the petitioner's ability to pay the proffered wage. The AAO will examine it, however, for illustrative purposes.

The 2001 Form 1065 contained in the record is for a company identified as a general partnership. The ordinary income of the partnership is reflected on line 22, page one of Form 1065. According to the form, the petitioner's ordinary income is a negative \$106,456. This sum is not sufficient to pay the proffered wage of \$26,187.20. Nevertheless, each of the partners in a general partnership, in this case both partners, is jointly and severally

responsible for the partnership's debts and obligations. Because each partner is obliged to satisfy those debts and obligations, as necessary, out of his or her own income and assets, the income and assets of each partner is correctly included in the determination of a general partnership petitioner's ability to pay the proffered wage. The petitioner's owner is obliged, however, to demonstrate that he or she could have paid the proffered wage out of his adjusted gross income and supported himself or herself, and his or her family, on the remaining funds.

Schedules K-1 of Form 1065 indicates distributions of \$212,343 to each partner from the partners' capital accounts, as well as ordinary income of -\$53,228 in 2001. Counsel's implication that the petitioner could pay the proffered wage out of its Partners' Capital Accounts is incorrect. Although an explanation of double-entry accounting is beyond the scope of today's decision, Partner's Capital Accounts are an offsetting credit to some asset and are not, in themselves, assets. They are not an account out of which the petitioner can withdraw funds to pay wages. They are not a fund available to pay the proffered wage. The record contains no further documentation of the partners' assets. Based on the negative ordinary income reflected on the Schedules K-1, neither partner had sufficient assets to pay the proffered wage. In addition, the record contains no further documentation on any other type of assets from which either individual partner could pay the proffered wage, and also support himself and any dependents. Thus, the financial information contained on the Form 1065 submitted in the instant petition would not establish a petitioner's ability to pay the proffered wage, based on the petitioner's net income.

With regard to the 2002 Form 1120S submitted by the petitioner, this document establishes that the petitioner is structured as an S Corporation and was incorporated in August 2001. The ordinary income of the petitioner for 2002, as reflected on line 21 of the tax return document, is \$1,426. This sum is insufficient to establish the petitioner's ability to pay the proffered wage of \$26,187.20 in 2002.

The tax return figures used by the director in his decision, namely the petitioner's ordinary income added to its depreciation deductions to compute business income, or total assets versus total liabilities are not figures that the AAO uses to demonstrate a petitioner's ability to pay a proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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. (Original emphasis.) *Chi-Feng* at 537.

This office will not consider the amount of the petitioner's depreciation deduction in the determination of the petitioner's ability to pay the proffered wage, notwithstanding that the director appeared to

sanction that approach. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

Therefore the director's determination of the petitioner's business income in the years 2001 and 2002 is both erroneous and irrelevant to these proceedings. 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, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. The petitioner's current assets include cash and inventory, as counsel correctly noted. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 tax returns reflect the following information for the following years:

	2001	2002
Ordinary Income (Form 1065)	\$ -106,456	
Taxable income <sup>8</sup> (Form 1120S)		\$ 1,426
Current Assets	\$ 0	\$ 43,375
Current Liabilities	\$ 0	\$ 32,305
Net current assets	\$ 0	\$ 11,070

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. As previously stated, the petitioner has not clearly established that it bought the restaurant business from the [REDACTED] Partnership. Without such documentation, it is not known whether the current petitioner is a successor in interest to [REDACTED] and whether the tax return information for 2001 from [REDACTED]

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>8</sup> Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

Partnership has to be examined to establish both the former and current petitioner's ability to pay the proffered wage. As such, the AAO's comments on the 2001 Form 1065 are provided to clarify issues raised previously by both the director and counsel. In 2001, as previously illustrated, the Form 1065 submitted by the petitioner to the record shows an ordinary income of -\$106,446, and no net current assets at the end of the year. The petitioner, based on the Form 1065 submitted to the record, has not demonstrated the ability to pay the proffered wage for the salient part of 2001, based on the net current assets identified in the Schedule L. In addition, it is noted that the record is devoid of any information as to the petitioner's business operations from August 1, 2001 to December 31, 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$1,426 and net current assets of \$11,070. Neither sum is sufficient to pay either the proffered wage of \$26,187.20. As previously stated, neither the general ledger document submitted in response to the director's request for further evidence nor the monthly banking statements submitted by counsel on appeal establish additional sources of funding to pay the proffered wage. Without more persuasive evidence, the petitioner did not demonstrate the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

As stated previously, the petitioner has not established that it is the successor in interest. For any subsequent proceedings, this is an issue that needs to be addressed. Even if the petitioner had provided enough persuasive evidence to settle this issue, it also did not establish that it by itself, or in combination with the former owner, had the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.