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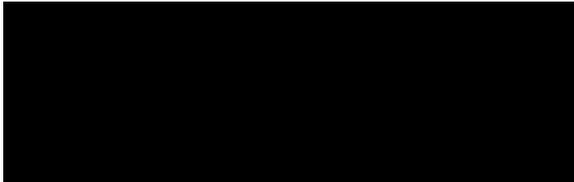
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



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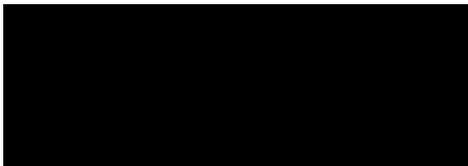
FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 03 222 52100

Date: SEP 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 service center director denied the employment-based 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. It seeks to employ the beneficiary permanently in the United States as a 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 asserts that the director's examination of the petitioner's monthly balances in its banking accounts was not based on regulations, or Citizenship and Immigration Services (CIS) authorization. Counsel asserts that the petitioner maintained sufficient funds in its bank accounts each month in 2001 to pay the beneficiary's salary, and that the beneficiary is replacing a departing employee. Counsel also asserts that the petitioner's letter stating that his diners employed approximately 100 employees was sufficient to establish the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$11.84, or an annual salary of \$24,627.20. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 2001, to have 30 employees, and to have a gross annual income of \$1,600,000. In support of the petition, counsel submitted a cover letter that stated the petitioner maintained a full service restaurant and catering business "on location" for 30 years. Counsel stated that the petitioner maintained a strong bank balance of \$20,000 in April 2001, the month the labor certification was filed. Counsel also stated that in April 2001 alone over \$80,000 passed through the

petitioner's bank account. Counsel also stated that the petitioner's monthly bank balances averaged \$7,000 to \$8,000, which was more than sufficient to pay the beneficiary's salary every month. Counsel also noted that in addition to the primary bank account, the petitioner also maintained a credit card account and the petitioner's president, [REDACTED] had an additional banking account. According to counsel, in April 2001, the balances of these two other accounts were \$10,196 and \$20,260. Counsel finally stated that not only did the petitioner have the ability to pay the beneficiary's salary throughout the year in 2001, it also had sufficient funds to pay his entire salary.

The petitioner's president also submitted a letter of support dated May 13, 2003 that stated the petitioner was established two years ago, and that the restaurant had seating for 350 people, with three separate meal menus and a full range menu for breakfast, lunch and dinner. The petitioner's president stated that the business had been at the same location for thirty years. The petitioner provided a letter of work verification from Little [REDACTED] as well as the first page of the petitioner's IRS Forms 1120 for 2001 and 2002. These pages indicated the petitioner had ordinary income of -\$252,858 in 2001 and ordinary income of -\$142,613 in 2002. The petitioner also submitted April 2001 bank statements from Commerce Bank, Cherry Hill, New Jersey, for the following accounts and balances: Money Market Account Number [REDACTED] \$13,207.40; Business Account Number [REDACTED] \$20,260.08; and Credit Card Account Number [REDACTED] \$23,129.95. The petitioner also submitted monthly bank statements for its business account for the months of July 2001 to September 2001. These statements indicated the following monthly balances from July to September 2001: \$8,418.22, \$3,524.09, and \$2,273.01. Finally the record contains bank statements for 2001 from Artisans Bank in Wilmington, Delaware, for Chester Spring Works, Philadelphia, Pennsylvania, and bank statements for 2003 from Commerce Bank, for [REDACTED]. Balance sheets for Chester Spring Works are also contained in the record.¹

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 22, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner submitted its federal income tax returns for 2001 and 2002, as well as its bank statements for 2001, 2002, and 2003.² The director stated that in order for CIS to consider the petitioner's bank statement, the petitioner must establish that the ending bank balances for the years were greater than or equal to the amount of the wages or that the monthly bank balances increased incrementally with the amount of funds necessary to meet the proffered wage. The director stated that the petitioner's bank accounts submitted to the record did not satisfy either criterion. The director apparently referred to the income statements found in the record for other companies and stated that these internally generated financial documents had little evidentiary value, as they were the representation of the petitioner's management. The director then stated that the petitioner must demonstrate its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director stated that evidence of this ability should be in the form of copies of annual reports, federal tax

¹ There is no explanation in the record for the submission of Pennsylvania companies' monthly balances. These documents are not viewed as part of the record.

² As stated previously the petitioner submitted bank statements for April 2001 from three accounts, while the 2003 bank statements are for a different company. None of the petitioner's 2002 bank statements are found in the record.

returns, or audited financial statements. The director also stated that if the petitioner employed 100 or more workers, a statement from the petitioner's financial officer to this effect might be accepted as proof of the petitioner's ability to pay the proffered wage. The director requested that the petitioner submit any of the following three types of documentation: the beneficiary's Form W-2 Wage and Tax Statements if the petitioner employed the beneficiary; a statement from the financial officer of the company that establishes the petitioner's ability to pay the proffered wage, if the petitioner had over 100 employees, or annual reports for 2001 and 2002, which are accompanied by audited or reviewed financial statements. The director added that additional evidence such as accredited profit/loss statements, bank account records, or personnel records might be considered in the proceedings, but only as supplementary evidence to establish the employer's ability to pay.

In response, counsel submitted a letter from Mr. [REDACTED] (Mr. [REDACTED] the petitioner's president. In his letter, Mr. [REDACTED] stated that he is the president and majority owner of four diners in the Delaware valley, and identified these diners as [REDACTED] Pennsylvania, and [REDACTED] Clementon, New Jersey. Mr. [REDACTED] also stated that he was part owner of a fifth diner. Mr. [REDACTED] reviewed the three bank accounts used for the petitioner, and states that as of April 2001, the balances of these accounts were \$10,196, \$8,744 and \$20,260. Mr. [REDACTED] stated that in the filing month of April 2001 alone, the petitioner had over \$38,000 in its bank accounts that were sufficient to pay the beneficiary's entire salary for 2001.

Mr. [REDACTED] then stated that the diners employ approximately 100 employees and that employees transfer from one diner to another as needed. Mr. [REDACTED] also stated that assets from one diner are used as needed in the other diners, and that he uses all funds available to him in the accounts and personal funds to keep the diners going. Mr. [REDACTED] stated that the [REDACTED] is being sold to new owners, and that the beneficiary is still needed in his other diners and will work at the [REDACTED] New Jersey. Mr. [REDACTED] stated that he always met payroll at the diners, and that the payroll at the [REDACTED] in 2001 was over \$300,000, or \$6,000 a week. Mr. [REDACTED] stated that gross sales were over \$1,000,000 in 2001. Finally Mr. [REDACTED] stated that the turnover in cooks in the diner business was high, and that the beneficiary was replacing a cook who left in 2001, and that the former employee's salary was included in the budget and costs. Mr. [REDACTED] stated that although the [REDACTED] was being sold in the fall, he had a need for the beneficiary's employment at the [REDACTED] as a cook, and that he would work there when the beneficiary gets permission to work. Counsel resubmits the first pages of the petitioner's three bank accounts statements for April 2001, as well as a letter from [REDACTED] C.P.As, L.L.C., the petitioner's accountant. This letter is submitted with a compiled unaudited Statement of Revenues and Expenses for [REDACTED] The statement covers eight months of business ending in August 31, 2002 and August 31, 2003.

On December 22, 2003, the director denied the petition. In his denial of the petition, the director reiterated his comments contained in his request for further evidence with regard to the petitioner's bank statements. The director stated that the bank statements for the month of April 2001 do not illustrate the year-end balance of each account. With regard to the statement of revenues and expenses submitted in response to the director's request for further evidence, the director stated that this document was based on the representation of the

petitioner's management, and as such, the preparer can not express any opinion as to whether the document fairly represents the petitioner's financial position. The director stated that only limited reliance can be placed on the facts presented in the submitted financial statements. Finally, the director stated that based on the evidence submitted to the record, the petitioner had not established its ability to pay the proffered wage from the time the priority date was established until the present.

On appeal, counsel states that the director acknowledged that the petitioner submitted bank account statements totaling \$39,200 for April 2001, the month the priority date was established. Since the beneficiary's salary is \$24,627, the petitioner had shown the ability to pay the wage at the time the priority date was established. Counsel also states that the director did not cite any legal authority when he discussed whether bank accounts could be considered in establishing the petitioner's ability to pay the proffered wage. Counsel states that the director seems to be saying that a petitioner need not have the salary at the end of the priority year but it does not matter if they have sufficient funds to pay the salary when the priority date is established. Counsel states that the regulations do not say that the ability to pay is established at the end of the year. Counsel states that the regulations state that the ability to pay must be shown at the time the priority date is established, namely April 2001. Counsel further asserts that the petitioner had sufficient funds in his bank account each month in 2001 to pay the beneficiary's salary. Counsel states that bank accounts for various months in 2001 were submitted with balances ranging from \$2,272 to \$8,418, and therefore the petitioner had established that in each month of the priority year, the petitioner had the ability to pay the proffered wage.

Counsel then states that, based on the I-140 petition, and the petitioner's president letter dated October 7, the beneficiary's position was not a new position, and therefore excess income was not needed to pay the proffered wage. Counsel asserts that although the petitioner had negative ordinary income in 2001, it paid over \$306,000 in salaries, including a salary to the cook the beneficiary would replace. Counsel also asserts that since the petitioner's president stated in his October 7, 2003 letter that he is the president and majority owner of four diners in the Delaware Valley employing approximately 100 employees, the petitioner's ability to pay has been established. Counsel states that employers with 100 employees are exempt from the submission of documentation to establish a petitioner's ability to pay a proffered wage. Based on the petitioner's president's statement with regard to his employees, the petitioner has established that it has the ability to pay the beneficiary.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedules L in any tax returns for the period of time in question.³ Although the criteria outlined by the director could

³ In the instant petition, the petitioner did not submit all accompanying schedules and statements with its

provide some insight into whether there are sufficient funds available to sustain paying the proffered wage over a period of time, there is no regulatory basis for such guidance. Furthermore, with regard to the petitioner's ability to pay the proffered wage as of the priority date, April 19, 2001, the petitioner's ending balance for April 30, 2001 does not establish that petitioner had such funds available as of April 19, 2001. An examination of the petitioner's ending balance for March 30, 2001 may have been more probative evidence, if the petitioner's monthly bank statements were to be given any evidentiary weight. Finally the record is not clear as to which bank account balances are from accounts identified as the petitioner, and which are from accounts of the petitioner's president.

Furthermore, counsel's reliance on the assets of the petitioner's president is not persuasive. First, the petitioner did not provide a complete copy of its 2001 Form 1120S, which would have identified its shareholders and/or officers. Thus, the record does not establish whether Mr. [REDACTED] is the sole shareholder or owner, or one of several. Although counsel in her response to the director's request for further evidence, and Mr. [REDACTED] in his October 7 letter, asserted that Mr. [REDACTED] majority owner of four diners, neither counsel nor [REDACTED] provided any further evidentiary documentation to establish his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Second, even if the petitioner had established Mr. [REDACTED] financial relationship to the petitioner more clearly, the petitioner is structured as an S corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at 3 (D. Mass. Sept. 18, 2003). Thus, the monies identified as of April 30, 2001 as balances for money market business and business accounts under the name of [REDACTED] would not be viewed as additional funds to be used to pay the proffered wage. It is also noted that the assets of the other diners, as apparently separate entities from the petitioner, also could not be considered as sources of additional funds with which to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, 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, without consideration of 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

2001 federal income tax return, so any examination of cash available at the end of the year as reflected in Schedule L is not possible.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As stated previously, the petitioner's ordinary income for 2001 is -\$252,858, and for 2002 is -\$142,613. Neither sum is sufficient to pay the proffered wage of \$24,627.20 in 2001 or 2002.

Counsel in her letter in response to the director's request for further evidence, stated that if depreciation were added back in 2002, the petitioner would have shown a profit in 2002 and possibly in 2003. 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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. As previously stated, the petitioner did not submit complete Forms 1120S federal income tax returns, with accompanying schedules and statements. Therefore the AAO cannot examine the petitioner's net current assets to determine whether the petitioner could pay the proffered wage in 2001 and 2002 based on its net current assets.

As stated previously, the monthly balance statements for April 2001 did not establish that the petitioner had sufficient funds available to pay the proffered wage as of the priority date and onward. In addition, although counsel asserts that the remaining bank statements for 2001 also establishes the petitioner's ability to pay the proffered wage, only the bank statements from July to September 2001 were found in the record.

Although both counsel and Mr. ██████ stated that the beneficiary is replacing another employee, neither counsel nor Mr. ██████ provided any further substantiation of this assertion. Counsel advised that the beneficiary will replace another cook. The record does not, however, name the cook, state his or her wages, verify their full-time employment and resignation, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position.

The director in his request for further evidence and counsel in her response to his request both referred to the ability of petitioners with more than 100 employees to submit a statement from the petitioner's financial officer to establish the petitioner's ability to pay the proffered wage. However, the petitioner presented conflicting evidence as to its actual number of employees, and insufficient documentation if the petitioner wished to establish that it had more than 100 employees. For example, in the initial I-140 petition, the petitioner stated it had 30 employees, however, Mr. ██████ stated that within his four diners in the Delaware Valley area, he employed more than 100 employees. Thus, the number of the petitioner's actual employees is in doubt. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." Therefore, Mr. ██████ statement as to overall employee strength is not viewed as conclusive enough documentation that the petitioner has over 100 employees. Without more persuasive evidence as to the actual employees employed only by the petitioner, and not by all four or five diners that are probably all separately incorporated, the petitioner has not established that it has 100 employees and thus, has the ability to pay the proffered wage to a new employee.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Finally Mr. [REDACTED] stated in his letter that the petitioner, [REDACTED] in Clementon, New Jersey was being sold and that the beneficiary would be working at another diner owned by Mr [REDACTED] in Berlin, New Jersey. However, a labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). It appears that the petitioner's president intends to employ the beneficiary as a cook at a different diner which may be outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

Furthermore, if the diner identified as the petitioner were sold to another business entity, the certified ETA 750 for the beneficiary would only be valid for the current petitioner, [REDACTED]. The new owners of the diner could then be considered as successor in interest to the present petitioner, if they chose to pursue the instant petition and certified ETA 750. Successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the new owner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor, the current petitioner, had the ability to pay the proffered wage as of the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The current petitioner would have to submit a new ETA Form 750 for the beneficiary at the new proposed place of employment in order to employ the beneficiary. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date.

Without further evidentiary documentation, the petitioner has not established that it had either sufficient ordinary income or net current assets to pay the proffered wage as of the priority date and onward, or that the beneficiary is replacing another employee.

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.