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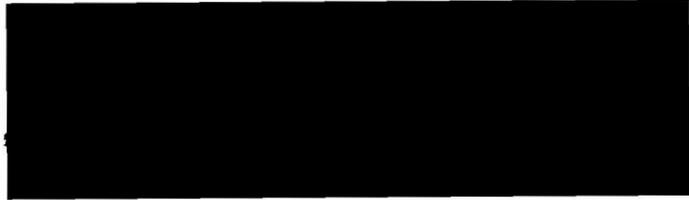
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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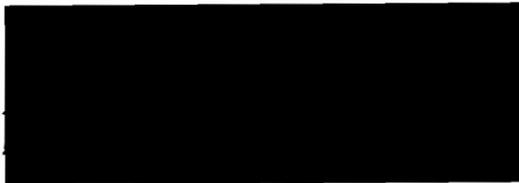


FILE: WAC 04 150 50667 Office: CALIFORNIA SERVICE CENTER Date: AUG 09 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 submitted a brief.

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 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 October 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

On the petition, the petitioner stated that it was established on September 4, 1997 and that it employs four workers. The petition states that the petitioner's gross annual income is \$251,147. Rather than providing its net annual income in the space provided the petitioner entered "2003," apparently indicating that the figure provided for its gross annual income pertains to that year.¹ On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in South Lake Tahoe, California.

In support of the petition, counsel submitted (1) the 2001 Form 1065 U.S. Return of Partnership Income of [REDACTED] located at the petitioner's current address, and (2) the 2002 and 2003 Form

¹ The petitioner's 2003 tax return confirms that the petitioner had gross receipts or sales of \$251,147 during that year.

1120S, U.S. Income Tax Returns for an S Corporation of the petitioner, [REDACTED]

The 2001 return shows that [REDACTED] was a general partnership, that its Federal Employer Identification Number (FEIN) was [REDACTED] that it incorporated on September 1, 1997, that it reported taxes pursuant to the calendar year and cash convention accounting. The return lists [REDACTED] and [REDACTED] as each owning half of [REDACTED] during that year. That return also indicates that it is [REDACTED] final return.²

During 2001 [REDACTED] declared ordinary income of \$2,650. The corresponding Schedule L shows that at the end of that year it reported neither current assets nor current liabilities and, therefore, no net current assets.

The 2002 and 2003 returns show that the petitioner is a corporation, that it incorporated on February 25, 2002,³ that its FEIN is [REDACTED] and that it reports taxes pursuant to cash basis accounting and the calendar year. Those returns list [REDACTED] as each owning half of the petitioner during each of those years.

During 2002 the petitioner declared ordinary income of \$1,558. At the end of that year the petitioner declared neither current assets nor current liabilities and, therefore, no net current assets.

During 2003 the petitioner declared ordinary income of \$2,003. At the end of that year the petitioner declared current assets of \$3,561 and no current liabilities, which yields net current assets of \$3,561.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 10, 2004, requested, *inter alia*, additional evidence pertinent to that ability.

In response, counsel submitted (1) an unaudited profit and loss statement for the first three quarters of 2004, (2) statements pertinent to the petitioner's bank account, (3) the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for all four quarters of 2001, 2002 and 2003, and the first three quarters of 2004, (4) a letter dated October 26, 2004 from the petitioner's accountant, and (5) counsel's own letter dated October 27, 2004.

The petitioner's quarterly wage reports show that during the first three quarters of 2001 the petitioner employed between two and three employees and paid them between \$800 and \$1,200 per quarter. The

² In this context "Final Return" means that the taxpayer did not anticipate filing another partnership return the following year, that is, that it will not operate as a general partnership during any portion of the following year.

³ Actually, only the 2003 return states the date of the petitioner's incorporation. That same space on the 2002 return was left blank.

petitioner appears to have had no employees during the final quarter of 2001. A box is checked on that form indicating "no payroll." Another box checked indicates that quarterly return is the entity's "final report."⁴

During the four quarters of 2002 the petitioner employed between four and seven employees and paid them from \$236.25 and \$10,000 during each of those quarters. The only people paid more than \$3,900 during any one of those quarters were [REDACTED]⁵ who were identified as the petitioner's owners during that year.

During the four quarters of 2003 the petitioner employed from four to six workers and paid them from \$88 to \$6,000 during each of those quarters. The only people paid more than \$3,900 during any of those quarters were [REDACTED] the petitioner's owners.

During the first three quarters of 2004 the petitioner employed from four to five workers and paid them from \$140 to \$14,000 during each of those quarters. The only people paid more than \$3,000 during any of those quarters were [REDACTED] the petitioner's owners.

The accountant's October 26, 2004 letter states that the petitioner distributed all of its profits in the form of bonuses to its employees. The accountant also states that the petitioner's net income during the first three quarters of 2004 was \$40,560.49.

In his October 27, 2004 letter counsel stated that the petitioner has a reasonable expectation of increased business and cited the increase in the petitioner's gross receipts during the salient years as support for that proposition. Counsel cited the unaudited profit and loss statement as evidence that the petitioner's gross revenue continued to increase during 2004. Counsel stated that an increase in costs prevented the petitioner from posting greater net income during 2002 and 2003 and cited the coming skiing season in Lake Tahoe as reason to believe that the petitioner's profitability would increase.

Counsel cited the petitioner's bank balances as evidence that its financial condition had improved and states that its quarterly wage reports indicate that the petitioner has always paid its workers without any problem. Counsel cited the accountant's October 26, 2004 letter to show that the petitioner paid out its profits as bonuses to its workers and provided printout of web content to demonstrate that the petitioner is well recognized.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of the petition is not precluded by the fact that the petitioner's net profit was less than the annual amount of the proffered wage during a given year.

⁴ This indicates that the partnership that filed that quarterly return did not anticipate continuing operations or, at least, having any employees during 2002.

⁵ In the petitioner's tax returns [REDACTED] is shown as having social security number [REDACTED]. On the quarterly reports she is listed as [REDACTED] with that social security number on some reports, as [REDACTED] with the same social security number on others, and as [REDACTED] with social security number [REDACTED] on yet other quarterly reports.

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 January 12, 2005, denied the petition.

On appeal, counsel submitted copies of evidence previously submitted and a brief dated February 9, 2005.

In his February 9, 2005 brief counsel renewed the arguments he previously made in response to the August 10, 2004 request for evidence. Further, counsel asserted that, because taxpayers seek to minimize their taxes, the petitioner's tax returns are a poor index of its ability to pay the proffered wage. Counsel states that the fact that the petitioner is a well-known restaurant demonstrates that the job offer is legitimate and implies that it thereby obviates the need for the petitioner to demonstrate its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). Finally, counsel states that the petitioner's profits will increase as a result of employing the beneficiary.

No evidence in the record supports counsel's assertion that hiring the beneficiary would increase the petitioner's profits. No evidence demonstrates that the beneficiary is a better cook than the petitioner's current cooks or that, if he is, this difference would be so apparent to the public that the petitioner's business would increase. Further, if the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁶ 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 reported on its tax returns.

Counsel's reliance on the unaudited profit and loss statement submitted is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel asserts that a taxpayer's tax returns do not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. The petitioner was obliged to demonstrate its ability to pay the proffered wage with one of those three types of evidence and chose to submit tax returns. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

Counsel asserts that the quarterly wage reports submitted show that the petitioner has never experienced difficulty paying its workers. They do not. They show the amounts the petitioner declared that it paid to its workers but do not show whether or not that payment posed any difficulty.

Counsel asserts that the petitioner paid its profits to its employees in the form of bonuses. In support counsel cites the accountant's letter. If the petitioner paid employee bonuses then those bonuses should have been reflected on the petitioner's quarterly reports. The quarterly reports do not demonstrate any large payments. They demonstrate low wages paid to the petitioner's employees and moderate payments to the petitioner's owners.

Further, the petitioner may have been obliged, by contract or otherwise, to pay those alleged bonuses to its employees. The small amounts paid in wages to the petitioner's employees suggest that some other compensation may have been expected. The petitioner has not demonstrated that it could have greatly reduced the amounts it paid to its workers without consequence.

Further, even the compensation the petitioner paid to its owners has not been shown to be available to pay the proffered wage. The record contains no evidence to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. Thus, the quarterly reports and the other evidence in the record is insufficient to show that the petitioner could have reduced payments to its other workers as necessary to pay the proffered wage.

Counsel cites an increase in costs during 2002 and 2003 as the reason the petitioner was unable to post greater profits during those years. Counsel states that those costs; rent and cost of goods sold (CGS), decreased during 2004, thus increasing the petitioner's profitability.

Specifically, counsel notes that during 2001 the petitioner's rent was \$42,600 and its CGS was \$49,536, that during 2002 the petitioner's rent and CGS were \$55,575 and \$85,340, respectively, and that during 2003 the petitioner's rent and CGS were \$57,951 and \$92,167, respectively. Those amounts are supported by the petitioner's tax returns for those years.

Counsel further states, "In 2004, the costs of goods were [sic] reduced to \$48,727.16 and the rent to \$42,200, [sic] respectively." Counsel appears to imply that the petitioner's costs have decreased, that its future costs

will remain low, and that the petitioner's poor performance during prior years should, therefore, be considered an anomaly. The only evidence to support counsel's assertion that the petitioner's expenses have decreased is the unaudited profit and loss statement submitted. As was noted above, because it is unaudited that profit and loss statement will be accorded no evidentiary weight. The record contains no reliable evidence pertinent to the petitioner's performance during 2004.

Counsel's assertion that the petitioner is a well-recognized restaurant is not supported and is, in any event, inapposite. The only evidence to support that assertion is that the petitioner's name was located pursuant to two Internet web searches, one on Yahoo.com and one on Google.com. The Yahoo search is for Indian restaurants and includes the petitioner. The Google search appears to be an all-inclusive listing of South Lake Tahoe restaurants. That the petitioner's restaurant can be located pursuant to a web search indicates that the petitioner does, in fact, operate a restaurant. It does not indicate that it is well recognized or that its profits are likely to increase.

Further, even if the petitioner were well recognized that would not indicate that its profits would increase. Even if the petitioner is now well recognized it likely was well recognized previously. This would not be an indication of an impending increase in business, but only of a continuation of business as before.

Counsel argues that the impending ski season will raise the petitioner's profits for the remainder of 2004. This does not explain or affect the prior years' low profits.

Counsel's citation of *Matter of Sonogawa, supra*, is unconvincing. *Sonogawa* does, in fact, hold that approval of a petition is not precluded by a single year's poor performance, so long as the petitioner has a reasonable expectation of improved profitability.

Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in *Sonogawa* the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

The petitioner in *Sonogawa* had previously been successful and 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. That the petitioner in that case had a single bad year was obvious. The reasons for it were clear. That it could be expected to rebound was palpable. The Regional Commissioner's determination in *Sonogawa* was based in part on the 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 evidence is insufficient to demonstrate that the

petitioner has ever posted a large profit. The increase in the petitioner's gross receipts do not show that it will become more profitable, absent a concomitant increase in profits. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, and 2003 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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 did not establish that it employed and paid the beneficiary.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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 net of 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

typically⁷ 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 \$24,960 per year. The priority date is October 30, 2001.

During 2001, [REDACTED] declared ordinary income of \$2,650.⁸ That amount is insufficient to pay the proffered wage. Its tax return at the end of that year showed no 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 has provided no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$1,668. That amount is insufficient to pay the proffered wage. Its tax return at the end of that year showed no 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 has provided no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$2,003. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$3,561. That amount is also insufficient to pay the proffered wage. The petitioner has provided no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The request for evidence in this matter was issued on August 10, 2004. On that date the petitioner's 2004 tax return was unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis.

Additional issues exist in this matter that were not addressed in the decision of denial. The petitioner is [REDACTED] a subchapter C corporation. The 2001 tax return provided is for [REDACTED] general partnership at the same address. That appears to indicate that the type of ownership pursuant to which the petitioner is held has changed.

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁸ For the sake of analysis of the petitioner's ability to pay the proffered wage this office will assume, *arguendo*, that [REDACTED] identical to the petitioner in this case. That assumption, however, is not demonstrated by the evidence as is addressed further below.

Further [REDACTED] each owned half of [REDACTED] 2001, whereas [REDACTED] each owned half of the petitioner during 2002 and 2003. The ultimate ownership of those two companies is not, therefore, the same. That the two companies each have a different FEIN also suggests that they are two different companies.⁹

By submitting evidence pertinent to the partnership and the corporation, counsel implies that the two companies are interchangeable. During 2001, however, the restaurant was owned by a partnership and during 2002 and 2003 as a corporation. Clearly, a new company, a corporation, was formed. Such a change in ownership triggers successorship issues addressed in *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). The petitioner must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that the corporation assumed all of the rights, duties, obligations, and assets of the partnership.

This issue was not raised in the decision of denial and the petitioner has not been accorded the opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue.

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.

⁹ The partnership's return covers 2001. The corporation's returns purport to cover 2002 and 2003. The 2003 return indicates, however, that the petitioner incorporated on February 5, 2002. Whether the petitioner was in business during 2002 prior to that date is unclear. If it was, then the petitioner has provided no evidence of its ability to pay the proffered wage during that period. If not, then the fact that the petitioner went out of business during a portion of the period during which this petition was pending exacerbates the ability to pay the proffered wage issue.

Further, the 2001 partnership return of [REDACTED] purports to cover all of 2001. The Form ETA 750 was filed during 2001, however, by [REDACTED] presumably the corporation, sometime prior to its incorporation, and therefore prior to its existence.

That the petitioner may have filed the request for labor certification in this matter sometime prior to its existence raises myriad additional issues. Because the issues raised by the possible cessation in business during early 2002 and the possibility that the labor certification application may have been filed by a then non-existent entity were not addressed in the decision of denial, this office declines to base today's decision, in whole or in part, on those considerations. If the petitioner attempts to overcome today's decision on motion, however, it should address those issues.