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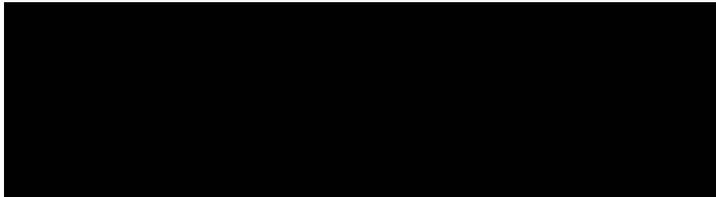
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Office: VERMONT SERVICE CENTER

Date: DEC 28 2008

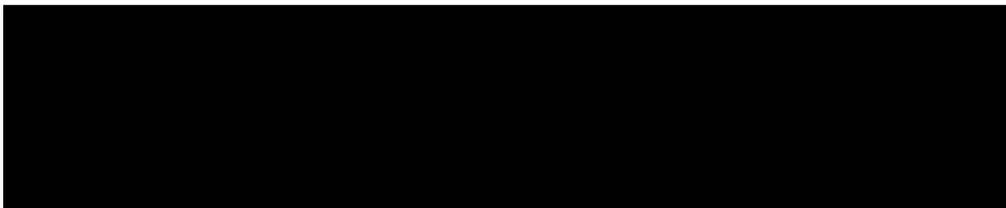
IN RE:

Petitioner:
Beneficiary



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The acting director also questioned the legitimacy of the job offer, noting that the evidence appeared to show that the instant petitioner had not yet incorporated when the Form ETA 750 in this matter was submitted to the DOL.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 Application for Alien Employment Certification 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19 per hour, which equals \$39,520 per year.

The Form ETA 750 as originally submitted stated that the petitioner's name was [REDACTED] and that its address was [REDACTED] in New York, New York. That form indicates that on February 9, 2004 that form was amended to show that the petitioner is [REDACTED] at [REDACTED] in New York City.

The Form I-140 petition in this matter was submitted on June 28, 2004. It indicates that the petitioner's name is [REDACTED] at [REDACTED]. On the petition, the petitioner stated that it was established on July 17, 2001 and that it employs five workers. The petition states that the petitioner's gross annual

income is \$315,876. The space reserved for the petitioner to reports its net annual income was left blank. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in New York, New York.

On the Form ETA 750, Part B, the beneficiary claimed to have worked for [REDACTED] from December of 2001 until at least the date he signed that letter. However, he signed the letter on March 2, 2001, a date which falls prior to December 2001.

The AAO reviews issues raised in decisions and challenged on appeal on a *de novo* basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a letter dated May 26, 2004 from the petitioner's owner, (3) the 2001 and 2002 joint Form 1040 U.S. Individual Income Tax Returns of the petitioner's president [REDACTED] and his spouse, (4) the 2003 joint Form 1040 U.S. Individual Income Tax Return of [REDACTED] and her spouse, (5) a map of a portion of New York, New York, (6) a letter dated December 2, 2004 from the Alliance for Downtown New York addressed to the petitioner's manager, (7) a WTC Business Recovery Grant Program Economic Analysis form and various insurance claim forms, (8) a copy of a bank statement of [REDACTED] and his spouse for the period ending November 25, 2004, and (9) an appeal brief. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns confirm that it is a corporation and that it is owned in equal shares by [REDACTED] and [REDACTED]. Those returns show that the petitioner incorporated on July 17, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year. That the petitioner incorporated on July 17, 2001 is consistent with the "Date Established" shown on the Form I-140, but indicates that the petitioner incorporated after the Form ETA 750 in this matter was filed on April 30, 2001.

During 2001 the petitioner reported ordinary income of \$4,110. At the end of that year the petitioner had current assets of \$4,610 and no current assets, which yields net current assets of \$4,610.

During 2002 the petitioner reported ordinary income of \$11,570. At the end of that year the petitioner had current assets of \$6,180 and no current assets, which yields net current assets of \$6,180.

During 2003 the petitioner reported a loss of \$7,833 as its ordinary income. At the end of that year the petitioner reported neither current assets nor current assets, which yields net current assets of \$0.

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

The WTC Business Recovery Grant Program Economic Loss Analysis form and the insurance claim forms purport to show that the [REDACTED] Restaurant applied for an insurance award and a grant to cover damages suffered as a result of the events of September 11, 2001. The relationship of that restaurant to the petitioner is unknown to this office. The WTC Business Recovery Grant Program Economic Analysis form purports to have been signed on March 27, 2001, prior to the events of September 11, 2001.

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

The map provided shows an area labeled "Restricted Zone." The December 2, 2004 letter from Alliance for Downtown New York states that the petitioner's location at [REDACTED] is within "The Restricted Zone." That letter states that pedestrian and vehicular traffic was restricted in that area from September 19, 2001 through September 26, 2001 but does not otherwise explain the significance of a business being within the restricted zone.

The petitioner's owner's May 26, 2004 letter notes that the petitioning restaurant began business during April of 2001² and states that its business was damaged because it is "a stones [sic] throw away from the disaster area." The petitioner's owner asserts that the restaurant was in a restricted zone after those events and that "business was [then] nonexistant." [sic] The petitioner's owner further asserts that the area was the site of "continuous road and sidewalk construction from March 2002 to late 2003, which also affected the petitioner's business.

The acting director denied the petition on November 22, 2004. On appeal, counsel asserted,

According to the petitioner's U.S. Corporation Income Tax Return for 2000 (Form 1120S, U.S. Income Tax Return for an S Corporation), the year in question, the petitioner generated gross receipts in the amount of **\$315,876.00** and demonstrated an asset base of **\$18,347.00**. [Emphasis in the original.]

This office notes that, contrary to counsel's assertion, the petitioner's 2000 tax returns are not in the record. Further, because the priority date of this petition is April 30, 2001 evidence pertinent to previous years would not be directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further still, as is explained in detail below, a petitioner's gross receipts and total assets are not indices of its ability to pay the proffered wage.

² This assertion appears to conflict with the statement on the Form I-140, confirmed by the petitioner's tax returns, that the petitioner incorporated on July 17, 2001.

Counsel also stated, "In the year 2001, the petitioner had shown standard deductions³ in the sum of \$121,184." The petitioner's 2001 tax return is in the record, but does not show the figure stated by counsel. The petitioner's deductions from income shown on that return total \$104,066. Counsel stated, "The fact that the petitioner demonstrated a nominal income should not be regarded in a negative light because same is a result of routine business deductions including the salaries." The amount of a petitioner's existing expenses, however, is not an index of its ability to pay additional wages, as will be explained further below.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that ". . . a corporate tax return is not substantial evidence upon which to base a decision of financial capability" Counsel further stated, "The disaster of September 11, 2001 in Manhattan, (New York) directly impacted the revenues of the petitioner by destroying the business due to its proximity to within a few blocks of world trade center disaster." Counsel added that "the financial holdings of the petitioner's owners as shown on the personal tax returns and other evidence submitted demonstrate that "the President of the Petitioning company has experience in running successful operations"

Counsel cited a nonprecedent decision of this office for the proposition that a petitioner has demonstrated the ability to pay the proffered wage if its monthly checking account balance exceeded the proffered wage. Counsel also cited two nonprecedent decisions of this office for the proposition that a petition may be sustained when the petitioner's loss "was properly taken for tax accounting purposes and the [petitioner had] sufficient cash on hand or checking account balances to pay the proffered salary.

Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Counsel also cited the petitioner's owner's personal income and assets as evidence of its ability to pay the proffered wage. Counsel stated,

Given the fact that the petitioner has shown substantial income that was adequately available through other sources, it can be directly construed that the petitioner [had] substantial resources to pay the beneficiary the offered wage.

Elsewhere in the brief counsel stated, "Please note that the petitioner's [sic] are is [sic] the sole officers/directors of [redacted]"

This office notes that counsel mistakenly identified one or more of the petitioner's owners as the petitioner in this case. However, the petitioner, as identified on the Form I-140 petition, is [redacted]

Counsel noted that because the petitioner is a subchapter S corporation its profits pass through to its owners without being taxed at the corporate level. Counsel asserted that the petitioner's owner's income should therefore

³ The term "standard deduction" is inapplicable to corporate taxation.

be included in the determination of the funds available to the petitioner, but without explaining his reasoning further.

Counsel stated,

(T)he petitioner has enclosed herewith copies of contracts where the beneficiaries are currently placed for employment. As evidenced by the invoices/timesheets/etc., the beneficiaries continue to work for the said clients and continue to generate substantial income for the petitioner.

No invoices, timesheets, etc. were submitted. Counsel's meaning pertinent to the employment of previous beneficiaries by the petitioner's clients and thus generating income for the petitioner is unclear. This office is therefore unable to address this point further. If counsel wishes to further explain this point and provide the evidence described this may be accomplished pursuant to a motion.

As to the discrepancy between the petitioner's date of incorporation and the priority date counsel stated,

(A)ttention is drawn to the fact that the petitioner's corporation had been incorporated in **July 2001**. As evidenced by the **underlying labor certification**, the labor certification was filed on behalf of the beneficiary by [REDACTED] The above named petitioner had taken over the underlying petitioner's company in the end of the year 2001. (documents attached) The documentation therefore satisfies the validity of the job offer that was questioned by the [Acting] Center Director.

[Emphasis in the original.]

Counsel argued on appeal that the petitioner's low profits should not be considered in the determination of its ability to pay additional wages because the low profit was the result of various expenses including salaries. This argument is not convincing. This office is aware that the petitioner's net income is the result of subtracting its expenses from its receipts. That observation does not, in itself, render the petitioner able to pay additional wages out of its net income.

Showing that the petitioner paid wages or other expenses in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁴ or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*,

⁴ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁵ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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.

The personal income tax returns provided show the income of two of the petitioner's three owners. Contrary to counsel's assertions, however, the personal income and assets of the petitioner's owners are irrelevant to the petitioner's ability to pay the proffered wage.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). A corporation's owners and shareholders are not obliged to pay the debts of the corporation, and the assets of its shareholders or of other enterprises or corporations cannot, therefore, be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, whether individual(s), a corporation(s), or some other entity or entities, cannot correctly be included as a fund available to the petitioner to pay the proffered wage.

The bank statement provided does not pertain to the petitioner. It is a statement of the account of one of the petitioner's owners and that owner's spouse. Therefore, as explained above, it is inapposite to the petitioner's ability to pay the proffered wage.

Further, even statements pertinent to a petitioner's own account may not generally be considered in assessing ability to pay the proffered wage. 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, bank statements do not demonstrate that the funds reported somehow reflect additional available funds that were not reported on tax returns.

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. In the instant case, however, counsel submitted only one monthly bank statement. The scenario described is therefore absent from the instant case, and this office does not purport to decide the outcome of that hypothetical case.

This office does not read *Matter of Sonogawa* to state that “a corporate tax return is not substantial evidence upon which to base a decision of financial capability,” as counsel does. Counsel is correct that *Matter of Sonogawa* held that a loss or low profit during a given year does not necessarily preclude finding that a petitioner had the ability to pay the proffered wage during that year. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. At issue, however, is whether the petitioner's low profits during each of the salient years has been demonstrated to be uncharacteristic, whether they occurred within a framework of successful years, and whether they are demonstrably unlikely to recur.

Here, the petitioner is a new business, and the record contains no evidence that it has ever posted a large profit. Although the record indicates that the petitioner's location at [REDACTED] was likely gravely affected by the events of September 11, 2001,⁷ the only evidence that, but for those events the petitioner would have proffered, are tax returns of the petitioner's president. Counsel argued that the petitioner's president's assets demonstrate that he has experience running successful operations, and implies that, therefore, the petitioner will also be successful and that the losses it has sustained were clearly the result of the events of September 11, 2001.

Counsel's inference is not compelling. That the petitioner's president has assets does not demonstrate that he obtained those assets from managing businesses. Even if the petitioner's president has previously managed businesses, and even if some or all of them have been successful, that does not demonstrate that the petitioner will necessarily, or even likely, also be successful. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. The record contains insufficient evidence that, but for the events of September 11, 2001, the petitioner would have been able to show the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer

⁷ This office notes that the petitioner's location at [REDACTED] is about two and one half blocks from the former site of the WTC twin towers, and well within the ambit of harm of the tragedy of September 11, 2001.

remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.⁸

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). 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

⁸ The beneficiary indicated on the Form ETA 750B that he worked for [REDACTED] Incorporated from December 2001 to at least March 2, 2001, a date that falls prior to December 2001. Also, the beneficiary did not state that he ever worked for the petitioner, [REDACTED]. Further, the record contains no evidence of wages paid to the beneficiary by either entity.

typically⁹ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$39,520 per year. The priority date is April 30, 2001.

During 2001 the petitioner reported ordinary income of \$4,110. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$4,610. 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 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 reported ordinary income of \$11,570. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$6,180. 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 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 a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had 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 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 petitioner failed to demonstrate that the petitioner 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 this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial. The Form ETA 750 appears to indicate that the original petitioner in this matter was [REDACTED] incorporated of [REDACTED] in New York but that the labor certification was amended on February 9, 2004 to show that the petitioner is now [REDACTED] of [REDACTED], also in New York. This suggests that the ownership of the petitioning restaurant may have changed hands from one corporation to another since the labor certification application was filed.

When such a change in ownership occurs the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It 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.

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

The substituted petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

No such evidence was presented in the instant case, which is another impediment to approval of the instant petition. Because this basis for denial was not raised previously, and the petitioner has not been accorded an opportunity to address it,¹⁰ today's decision does not rely upon that ground, even in part, as its basis. If the petitioner attempts to overcome today's decision on motion, however, it should provide evidence that the substituted petitioner in this case is the true successor of the original petitioner within the meaning of *Dial Auto Repair Shop*.

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.

¹⁰ Although the acting director may have considered that his objection to the legitimacy of the job offer as stated in the decision of denial raised the issue of the instant petitioner's successorship, this office finds that the wording of the decision was insufficient to inform the petitioner that one basis of denial was the petitioner's failure to address successorship, and did not, therefore, accord the petitioner sufficient notice that it should address that issue on appeal.